COMPLIMENTS OF

ALBERT C. RITCHIE

ATTORNEY GENERAL

ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1919

ALBERT C. RITCHIE

ATTORNEY GENERAL

ATTORNEYS GENERAL OF MARYLAND.

	Year
Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
Nathaniel Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
*Alexander Randall	1864
Isaac D. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1883
William Pinkney Whyte	1887
John P. Poe	1891
Harry M. Clabaugh	1896
George R. Gaither, Jr.	1899
Isador Rayner	1900
William S. Bryan, Jr.	1904
Isaac Lobe Straus	1908
Edgar Allan Poe	1912
Albert C. Ritchie	1916

*The office of Attorney-General was abolished by the Constitution of 1851, but was re-established by the Constitution of 1864.

STATE LAW DEPARTMENT.

Albert C. Ritchie.....Attorney General.

Ogle Marbury.....Assistant Attorney General.

John M. Requardt.....Assistant Attorney General.

William Pinkney Whyte, Jr.....Assistant Attorney General.

Philip B. Perlman.....Assistant Attorney General.

Miss Virginia Ellinger.....Stenographer.

Miss Annetta Backman.....Stenographer.

Miss E. Isabelle Coale.....Stenographer.

OFFICE:—633-645 Title Building, Baltimore, Md.

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ANNUAL REPORT FOR 1919.

OFFICIAL OPINIONS.

Annual Report for 1919

BALTIMORE, MD., *December 20, 1919.*

Hon. Emerson C. Harrington,
Governor of Maryland,
Annapolis, Md.

DEAR GOVERNOR HARRINGTON:

I have the honor to present to you, as required by section 8 of the Act of 1916, Chapter 560, a report of the business and proceedings of the Department of Law during the past calendar year, together with a statement of receipts and disbursements during the past fiscal year.

As further required by said Article 8, the official opinions rendered by my Department during the preceding calendar year follow this report. I also append several important opinions handed down by *nisi prius* courts in cases which were not appealed.

I am making this report as of December 20, 1919, because my term of office as Attorney General of Maryland expires today.

SUPREME COURT OF THE UNITED STATES.

Dakota Central Telephone Company vs. State of South Dakota, etc. Nos. 957 and 967, October Term, 1918. The Chesapeake and Potomac Telephone Company of Baltimore City, acting under the war-time authority of the President and the Postmaster General, established and put into effect on May 1, 1919, a new schedule of telephone rates and charges without first obtaining the permission of the Public Service Commission. Similar action had previously been taken by telephone companies in other states, and cases involving the legality of such proposed new schedules were instituted in South Dakota and Massachusetts. These cases had ultimately reached the Supreme

State Industrial Accident Commission vs. Downton. October Term, 1919. Appeal from an order of the Circuit Court for Allegany County reversing an award of the Commission. Meaning of "dependent" under Workmen's Compensation Law. Order reversed and cause remanded. Mr. Whyte appeared for the Commission.

CIVIL CASES FINALLY DISPOSED OF IN LOWER COURTS.

United Railways and Electric Company vs. State Roads Commission. Suit for cost of removing poles from Liberty Heights Avenue. Tried on agreed statement of facts. Judgment for plaintiff for $4,109.36. Mr. Marbury appeared for the Commission.

State Board of Prison Control vs. J. Booker Clark. Circuit Court for Howard County. Suit for labor of prisoners from House of Correction. Judgment for plaintiff and amount of judgment collected. Mr. Whyte appeared for the State Board of Prison Control.

Charles H. Kaufman vs. E. Austin Baughman, Commissioner of Motor Vehicles. Baltimore City Court. Petition for mandamus to compel the Commissioner to register a Packard motor-truck. Petition dismissed after testimony and argument. Mr. Perlman appeared for the Commissioner.

Mayor and City Council of Baltimore vs. M. Bates Stephens, State Superintendent of Schools. Mandamus. Superior Court of Baltimore City. *Mayor and City Council of Baltimore vs. Hugh A. McMullen, Comptroller.* Bill for injunction. Circuit Court for Anne Arundel County. *Board of Education of Baltimore County vs. Hugh A. McMullen, Comptroller.* Bill for injunction. Circuit Court for Anne Arundel County. These cases presented, in different phases, the question whether Baltimore City or Baltimore County should have that part of the general school fund, apportioned on the basis of the school population in the new annex, which was payable after January 1, 1919. The question was decided in favor of the city. Mr.

Marbury and Mr. Perlman appeared for the State Superintendent of Schools and the Comptroller.

Edgar Cullison vs. William J. Frere, State Tobacco Inspector, etc. Baltimore City Court. Suit for payment of award of State Industrial Accident Commission. Demurrer of defendants sustained without leave to amend declaration and case dismissed. Mr. Perlman appeared for the Tobacco Inspector and the State.

In the Matter of the Revocation of the Operator's License of John P. Quinn. Baltimore City Court. Appeal from decision of the Commissioner of Motor Vehicles. Decision reversed. Mr. Marbury appeared for the Commissioner.

State to use of Eleanora Wagner, etc., vs. State Roads Commission, et al. Superior Court of Baltimore City. Damage suit. Demurrer of State Roads Commission sustained. Mr. Perlman appeared for the State Roads Commission.

Michlena DePasquale vs. State Accident Fund. Superior Court of Baltimore City. Appeal from decision of State Industrial Accident Commission. Appeal dismissed upon payment of costs. Mr. Marbury appeared for the State Accident Fund.

In the Matter of the Suspension of the Chauffeur License of Albert C. Jones. Circuit Court for Baltimore County. Appeal from decision of Commissioner of Motor Vehicles. Decision reversed. Mr. Whyte appeared for the Commissioner.

The Equitable Mortgage and Trust Co. vs. William P. Jackson, State Treasurer. Baltimore City Court. Friendly suit for delivery of securities. Mr. Perlman represented the State Treasurer.

Francis E. Steinmeier vs. E. Austin Baughman, Commissioner of Motor Vehicles. Baltimore City Court. Appeal from suspension of license. Decision of Commissioner affirmed. Mr. Perlman appeared for the Commissioner.

State vs. Anderson and American Surety Co. Circuit Court for Worcester County. Suit on collector's bond. Judgment for defendants. John W. Staton, Esq., special counsel, appeared for the State.

In addition to the above cases, there were tried during the year a number of replevin suits against the Board of Police Commissioners of Baltimore City. Mr. Whyte handled these cases. They were all brought to recover property taken by the Police Board in connection with criminal prosecutions or charges. These cases were as follows:

Samuel H. Lampe. Baltimore City Court. Judgment for Police Board.

Kohler and Belvin. Baltimore City Court. Judgment for plaintiffs. Costs on other defendants.

London and Lanchashire Fire Insurance Company. Superior Court of Baltimore City. Costs on plaintiffs.

Eva Lanahan. Baltimore City Court. Judgment for plaintiff. Costs on other defendants.

Ellen R. Bean. Superior Court of Baltimore City. Judgment for plaintiff. Costs on other defendants.

Howard P. Page. Baltimore City Court. Settled. Plaintiff to pay costs.

Jacob Myer. Baltimore City Court. Dismissed by plaintiff.

CASES PENDING IN THE UNITED STATES SUPREME COURT.

Chesapeake and Potomac Telephone Company vs. State Roads Commission. Writ of error to Court of Appeals. Involves State Roads Commission's right to collect rental for telephone company's use of York Turnpike after its acquisition by the State. 134 Md. 1.

American Telephone and Telegraph Company vs. State Roads Commission. Writ of error to Court of Appeals. Involves State Roads Commission's right to collect rental for telephone company's use of Conowingo Bridge after its acquisition by the State. 134 Md. 11.

CASES PENDING IN THE COURT OF APPEALS.

Mayor and City Council of Baltimore vs. Sam W. Pattison, Clerk of the Criminal Court of Baltimore City. January Term, 1920. Appeal from the Baltimore City Court. Suit to

determine liability of the City for fees in criminal cases. Judgment for Mr. Pattison in the lower Court for $19,234.91. The two related cases of Sheriff McNulty and State's Attorney Broening against the City are pending in the Baltimore City Court under agreement to abide by the result of the Pattison case. The McNulty case involves about $2,500 and the Broening case about $3,800. Mr. Marbury and Mr. Perlman appeared for the State officials in these cases in the lower courts.

N. Winslow Williams vs. State. January Term, 1920. Appeal from the Superior Court of Baltimore City. Suit for fees retained by Mr. Williams while Secretary of State. Judgment for the State in the lower Court for $6,729.77. Both Mr. Williams and the State have appealed. Similar suits against former Secretaries of State Graham and Simmons are pending in the lower Courts, waiting the result of the Williams' case. Mr. Perlman appeared for the State in the lower Court. See *post* for lower Court's opinion and also Attorney General's opinion. Vol. 1, page 142.

Nobura Ishida vs. State. January Term, 1920. Appeal from the Circuit Court for Baltimore County. Conviction of manslaughter.

Cases Pending in the Lower Courts.

Robert W. Wells vs. Maryland Agricultural College and the Maryland State College of Agriculture. Circuit Court for Prince George's County. Suit for salary. An agreement of settlement has been reached in this case, but the case cannot be finally disposed of until the Legislature makes an appropriation.

Bradshaw vs. McMullen. Circuit Court for Anne Arundel County. Test of Mother's Pension Law.

United Railways and Electric Company vs. State Tax Commission. Circuit Court No. 2 of Baltimore City. Case stated for determination of liability of the railway company for bonus tax on increased stock.

State vs. People's Savings Bank of Baltimore, Inc. Circuit Court of Baltimore City. Bill for receivership after examination by the Bank Commissioner.

Rufus W. Norwood vs. August Ellis, Jr. Baltimore City Court. Suit for false arrest against police officer.

Milton C. Naditch, etc., vs. Wallace Brummel, et al. Superior Court of Baltimore City. Suit for malicious prosecution against employees of Commissioner of Motor Vehicles.

Hugh F. Smith vs. Ernest Bohannan vs. Conservation Commission of Maryland. Circuit Court for St. Mary's County. Bill for injunction against leasing ground in St. Jerome's Creek.

Arthur S. Stevenson vs. E. Austin Baughman, Commissioner of Motor Vehicles. Circuit Court for Carroll County. Bill to enjoin the Commissioner from taking away registration markers on traction engine.

Patrick Hanley vs. State Roads Commission. Circuit Court for Baltimore County. Bill to enjoin encroachment on land.

Ex Parte in the Matter of the Trust Estate Under the Will of William Ferguson, Deceased. Circuit Court for Baltimore County. Petition of State for collateral inheritance tax.

Josephine Giggndelle vs. State Accident Fund. Circuit Court for Allegany County. Appeal from decision of the State Industrial Accident Commission.

Mayor, Counsellor and Aldermen of the City of Annapolis, etc., vs. State Board of Health. Circuit Court for Anne Arundel County. Bill to enjoin the construction of a filtration plant in the City of Annapolis.

Samuel Cummins vs. Maryland State Board of Motion Picture Censors. Baltimore City Court. Appeal from decision of Board refusing permission to exhibit.

Laura S. Luck vs. State Roads Commission. Circuit Court for Anne Arundel County. Replevin of certain personal property.

David T. Benson vs. Veterinary Medical Board. Baltimore City Court. Mandamus to compel Board to grant Veterinary license.

William I. Smith, et al., vs. Conservation Commission. Circuit Court for Talbot County. Bill to restrain the granting of an oyster license.

John William Baker vs. State Industrial Accident Commission, et al. Circuit Court for Allegany County. Appeal from decision of the Commission.

George Kofskey vs. State Roads Commission. Circuit Court for Baltimore County. Injunction to prevent damages to land.

In the Matter of the Mortgage from Alexander Lacey and Thos. Vincent, etc. Circuit Court for Montgomery County in Equity. Petition of State for proceeds of sale of escheated land.

State vs. The Stevensville Bank. Circuit Court for Queen Anne's County. In Equity. Bill for receivership after examination by Bank Commissioner.

In addition to the above cases, there are a number of replevin suits against the Board of Police Commissioners which have not yet been tried.

In each of these cases certain property held by the Police Board in connection with criminal prosecutions is claimed by the plaintiffs. The respective plaintiffs and the courts in which the actions are pending are as follows:

D. Myers & Sons. Superior Court of Baltimore City.

Frank M. Fisher. Superior Court of Baltimore City.

Baltimore Dry Docks and Ship Building Company. Superior Court of Baltimore City.

Andrew R. Myers. Baltimore City Court.

Jacob Levin. Superior Court of Baltimore City.

George Winters. Baltimore City Court.

Harry Gammerman. Court of Common Pleas .

CONDEMNATION AND TITLE WORK—SPECIAL COUNSEL.

In condemnation and title work local counsel are always necessary, and sometimes, of course, in other cases. The authority to employ special or local counsel is given by section 9 of Chapter 560 of the Acts of 1916. Their fees are usually

paid by the particular Board or Department for which the work is done. The cases of this character during the fiscal year ended September 30, 1919, were as follows:

Carroll County. Collection of claim for Comptroller by Edward O. Weant, Esq. Commission, $57.96.

Garrett County. Examination of title for State Board of Forestry. Counsel, F. A. Thayer. Fee, $10.00.

Howard County. Examination of title for State Board of Forestry. Counsel, Charles C. Wallace. Fee, $75.00.

Examination of titles for State Board of Prison Control by Title Guarantee and Trust Co. Fee, $146.25.

Worcester County. Suit on Collector's bond. John W. Staton, Esq., had been employed to represent the State when the suit was instituted, some years before my term of office began. Fee, $75.00.

State Roads Commission, et al., vs. B., C. & A. Ry. Co., et al. Interstate Commerce Commision. Railroad rates on crushed stone. See Attorney General's Opinion, Vol. 1, page 12, Vol. 2, page 16. John B. Daish, Esq., represented the State Roads Commission, and a fee of $750 was paid his estate, Mr. Daish having died after the conclusion of the case.

Tax Collections. Commissions paid Charles B. Hoffman and James Clarke Murphy, $1,770.59. This was paid out of a special appropriation for the purpose.

State Board and Commissions.

The legal work for the various State Departments, Boards and Commissions continued exacting, but there is no necessity for any detailed reference to it.

Legislation for General Assembly of 1920.

In view of my election as Governor of Maryland, I have concluded not to include any legislative recommendations in this report, but instead to make them later in the capacity of Governor.

Conclusion.

In conclusion, permit me to express my appreciation of your unfailing courtesy and consideration upon all occasions, and of that of the other State officers connected with your administration.

I have the honor to remain

Respectfully yours,

Albert C. Ritchie,
Attorney General.

Cost of the State's Legal Work During the Fiscal Year Ended September 30th, 1919.

Appropriations under Act 1918, Ch. 206	$24,000.00	
Appearance fees paid into State Treasury	99.00	
Costs of briefs reimbursed State Treasurer	33.75	
Special Counsel fees paid from appropriations of other departments	1,114.21	
Total Receipts		$25,246.96
Salary of Attorney General (salary for October and November waived, Attorney General serving as Counsel to War Industries Board)	$4,166.49	
Salaries of Assistant Attorneys General	10,000.00	
Stenographers and office help	2,573.00	
Rent	1,399.92	
Postage	129.35	
Office Supplies	273.81	
Books and Periodicals	72.10	
Printing Annual Report and Opinions	890.00	
Office Furniture	50.00	
Water, Ice, Towels, Miscellaneous	128.65	
Travelling and Hotel Expenses	103.32	
Extra Typewriting	101.35	
Records, Briefs, Testimony and Court Costs	527.10	
Commission to Attorneys, on claims of the State	1,770.59	
Telegraph and Telephone	353.49	
Special Counsel, Condemnation cases, title examinations, etc	1,114.21	
Total Cost		$23,653.38

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL OF MARYLAND.

ADMINISTRATION OF ESTATES.

ADMINISTRATOR'S COMMISSIONS, REMOVED AND DE BONIS NON —BOTH SUBJECT TO STATE TAX.

Walter C. Mylander, Esq., January 16, 1919.
318 *Law Building,*
Baltimore, Maryland.

DEAR MR. MYLANDER: I beg to reply to your recent letter in which, at the request of the Orphans' Court of Baltimore, you ask my opinion as to whether (1) the commissions allowed a removed administrator and the commissions allowed the administrator d. b. n. are both subject to the state tax under the Act of 1916, Chap. 559, and (2) what would be the situation if no commissions are allowed the removed administrator.

This tax is not imposed upon the estate, but upon the commissions allowed the administrator, and the act expressly makes *all* commissions allowed executors and administrators subject to the tax. I have no doubt, therefore, that the removed administrator must pay the tax on the commissions allowed him and that the administrator d. b. n. must pay the tax on the commissions allowed him. No question of double taxation is involved. Each administrator simply pays the tax on the commissions he receives. This conclusion is in accord with an opinion rendered by Acting Attorney General Marbury to the State Comptroller on June 27, 1918, and with an opinion given by me under the former law, and reported in Attorney General's Opinions, Vol. 1, page 262.

As to your second inquiry, I think that commissions at least equal to the amount of the tax must be allowed the removed administrator, in the absence of some act on his part which results in their forfeiture—such, for instance, as was involved in Kealhofer vs. Emmert, 79 Md. 248, 252. The Act of 1916 seems to me quite clear on this point.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

ADMINISTRATION OF ESTATES—STATE TAX ON COMMISSIONS.

September 9, 1919.

Howard W. Jackson, Esq.,
Register of Wills,
Baltimore, Maryland.

DEAR MR. JACKSON: I beg to reply to your favor of September 3rd, relative to the estate of August Stowman. I understand that this estate consists of personalty amounting to about $56,000 and real property in Arkansas amounting to about $86,300, and that part of the personalty has been accounted for, and upon this the state tax on executors' commissions of one per cent on the first $20,000 and one-fifth of one per cent on the balance has been collected. The proceeds of the real estate are now about to be accounted for, and you ask whether a state tax of one per cent should be imposed on the first $20,000 of these proceeds, or whether the tax should be one-fifth of one per cent on the whole of these proceeds.

If my understanding of the facts, as just stated, is correct, then the tax which should be imposed on the whole proceeds of the real estate should be one-fifth of one per cent. Under Bagby's Code, Art. 81, Sec. 115, the state tax on one per cent is only imposed upon the first $20,000 of the estate, and having been once collected it cannot be collected again.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION.

FISH—SHAD AND HERRING—LICENSES IN POTOMAC RIVER—EFFECT OF ACT OF 1914, CH. 815.

January 29, 1919.

Col. Harry J. Hopkins,
State Comptroller's Office,
Annapolis, Maryland.

DEAR COLONEL HOPKINS: I beg to reply to your favor of January 16th, in which you ask whether Sections 50 and 51 of Article 39 of Bagby's Code, relating to licenses to fish for shad and herring in the Potomac River or its tributaries, were impliedly repealed by the Act of 1914, Ch. 815, codified in Bagby's Code, Vol. 3, Art. 39, Sec. 111, relating to licenses to fish in the Chesapeake Bay, and the tributaries thereof. The question arises because of the doubt in your mind as to whether the Potomac River would be regarded, within the contemplation of this legislation, as a tributary of the Chesapeake Bay, and whether the Act of 1914, which provides for licenses to fish in the tributaries of the Chesapeake Bay, would thus apply to the Potomac River, and supersede Secs. 50 and 51, which apply specifically to the Potomac River.

The Act of 1914 did not affect the license mentioned in Secs. 50 and 51. This license, which is referred to in Secs. 49 to 58, inc., is required for fishing, whether for sale or otherwise, with seines, gill nets or nets of any kind, for shad or herring, in the Potomac River and its tributaries, and no hauling seine license can be issued to anyone who is not the owner or occupier of a fishing shore on the river, and no gill net license can be granted except to *bona fide* citizens of the counties bordering on said river.

Secs. 110 to 121 require a license to fish for sale only, with pound nets, fykes, haul seines or other contrivances, except hook and line, in the Chesapeake Bay, below Pool's Island, and the

tributaries thereof, such license to be confined to residents of Maryland, and not to authorized fishing, except with hook and line, within the jurisdictional limits of any county of the State.

The Act of 1914, Ch. 815, amending Sec. 111, extended this last-mentioned license to the tributaries of the Chesapeake Bay, but the Legislature did not intend thereby to do away with the license for shad and herring fishing which Secs. 49 to 58 specifically provided for the Potomac River. This license is still necessary in cases covered by the terms of these sections.

In Attorney General's Opinions, Vol. 2, page 69, I dealt with the amount of fees required by Sec. 111.

I return you Mr. Killian's letter on the subject.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—FISH—LADDERS IN WATERS ABOVE EBB AND FLOW OF TIDE.

February 17, 1919.

E. Lee LeCompte, Esq.,
State Game Warden,
512 *Munsey Building,*
Baltimore, Md.

DEAR MR. LECOMPTE: I beg to reply to your favor of February 13.

You say that there are two mill properties and dams on Winter's Run, in Harford County, and the owners decline to place fish ladders upon said dams, under Bagby's Code, Art. 39, Sec. 81, on the ground that they own the property on both sides of the dams, and that, for this reason, the Act does not apply.

Winter's Run is a small stream with shoal water coming from springs in the upper section of Harford County. It runs

into Otter Creek, which is part of Bush River. At the points where the dams are located, Winter's Run is not tidewater, but runs only in one direction.

You ask whether the owners of these dams are relieved from complying with the Act above mentioned, on the ground that they own the property on both sides of the dams.

Sec. 81 of Art. 39 of Bagby's Code was originally the Act of 1902, Ch. 358, Sec. 78D. This Act provides, as Sec. 81 still does, that "every owner of a dam or dams upon any of the said waters of this State" should be required to maintain at least one fish ladder upon such dam or dams. The "said waters" referred to are, as Sec. 78A of the Act of 1902 (now Sec. 78 of Art. 39) shows, "any waters of this State, above a point where the tide ebbs and flows," and the preamble of the Act of 1902 recited that the Act was passed "to secure greater uniformity in the laws of this State governing the protection and increase of the food fishes in all the waters of this State, above the point where the tide ebbs and flows, in order to a more equitable and effectual enforcement thereof."

This legislation was re-enacted by the Act of 1906, Ch. 161, with the same preamble and provision as to its application to "any waters of this State, above a point where the tide ebbs and flows," and Sec. 81 was again re-enacted by the Act of 1914, Ch. 366, with an amendment requiring Harford County to pay one-half the cost of constructing such fish ladders upon dams in said county.

The object of this legislation is very clearly for the protection and increase of fish in all the waters of the State above the point where the tide ebbs and flows, and the owners of the dams in question are, I think, clearly required to place fish ladders thereon. The fact that they own the property on both sides of the dams does not relieve them from this obligation.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—FISH—SEIZURE OF FISH POTS.

February 24, 1919.

E. Lee LeCompte, Esq.,
State Game Warden,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR MR. LECOMPTE: I beg to reply to your favor of February 6.

The Act of 1916, Ch. 404, Sec. 5, makes it unlawful to fish in the waters of Frederick County with fish baskets or fish pots, and you ask whether the Deputy Game Warden can destroy fish pots, in case the owners do not remove the same, after reasonable notice to do so.

The Act does not make the mere possession of fish pots unlawful. The penalty which the Act provides for a violation of this section is a fine (Sec. 8), and the power to search for and seize *fish* caught contrary to the law is given by Secs. 52 to 57 of Art. 99 of Bagby's Code, Sec. 52 having been amended by the Act of 1916, Ch. 386, and Sec. 56 by the Act of 1918, Ch. 468. There is, however, no statutory authority to seize and destroy the fish pots themselves.

While this is true, it is also true, you state, that a fish pot is a structure built into the waters in such manner that it is immovable. It can only be removed by destroying it. When so placed in the waters of Frederick County, it can be used for no lawful purpose. Its only possible use would be to catch fish in violation of the Act in question.

Under these circumstances, it is clear that the authorities may summarily seize the fish pots (Soper vs. Michal, 123 Md. 542), and if the only way to seize them, and prevent their further illegal use, is to destroy them, then, in my opinion, this can be done.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—FISH—SHAD AND HERRING LICENSES IN POTOMAC RIVER.

February 27, 1919.

W. Thomas Kemp, Esq.,
Chairman, Conservation Commission,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR SIR: I beg to reply to your favor of February 26, in which you ask whether the general law, requiring licenses for shad and herring fishing in the Potomac River, Bagby's Code, Art. 39, Secs. 49 to 58, is in force in that portion of the Potomac River lying within Charles County, or whether the local law for Charles County, Code, P. L. L. 1888, Art. 9, Secs. 66 to 77, is in force as to such waters.

The general law was enacted by the Act of 1870, Ch. 205, and, with the exception of an amendment made by the Act of 1872, Ch. 292, has not been amended since. It provides that "no person shall fish in the Potomac River or its tributaries for shad and herring during the season prescribed in Sec. 36" (May 15 to June 1 each year), "with seines, gill nets or nets of any kind," without the license prescribed.

The local law for Charles County was enacted, two years later, by the Act of 1872, Ch. 198, and was amended by the Act of 1878, Ch. 502. Sec. 3 of the Act of 1878, codified as Sec. 68 of the Code, P. L. L. 1888, Art. 9, requires the license therein referred to for all seines and nets in the waters mentioned in Secs. 1 and 2 of the Act (now Secs. 66 and 67 of Art. 9), and these waters are "the Patapsco River or its tributaries" and "the Wicomico River or its tributaries, lying in Charles County, between Maryland Points, in Charles County, and Chisildine's Island, in St. Mary's County."

The general law of 1870 and 1872, therefore, requires licenses for shad and herring fishing, with seines and nets, in the Potomac River or its tributaries, and the subsequent local law of

1878 requires a special license for all seines and nets in that part of the Potomac River or its tributaries, lying in Charles County. It seems to me clear that the license for such fishing in the Potomac River or its tributaries, within Charles County, is the license required by Sec. 68 of Art. 9 of the local law, and not the license provided by the general law.

I do not think that the local law can be construed as applying only to the tributaries of the Potomac River within Charles County, leaving the general law to apply to the Potomac River itself, within as well as without that county. The local law, as first enacted by the Act of 1872, Ch. 198, did refer to "the inlets or tributaries of the Potomac River, lying in Charles County," and it might well have been claimed that the law at that time applied only to the tributaries, and not to the river itself; but the words quoted were stricken out by the amendment of 1878, Ch. 502, and in their place the present words "Potomac River or its tributaries" were substituted. This makes it clear that the local law applies to the Potomac River, as well as to its tributaries, lying within Charles County.

I may add that the constitutionality of this local law for Charles County was attacked in the case of Rayner vs. State, 52 Md. 368, but the appeal was dismissed on the ground that the constitutional question could only be raised by *certiorari*. I cannot find that the question was ever raised again. The main ground of attack, however, was that the law discriminated against the fishery rights of citizens of the State residing outside Charles County, and in view of recent decisions of the Court of Appeals on this point, particularly State vs. Shapiro, 131 Md. 168, 171, 173, and State vs. Mercer, 132 Md. 263, 268, I would be unwilling to advise that the local law is not valid.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—FISH—SHAD AND HERRING LICENSES IN THE POTOMAC RIVER.

March 10, 1919.

W. Thomas Kemp, Esq.,
Chairman, Conservation Commission,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR SIR: I have your favor of March 6, with reference to my opinion to the Comptroller of January 29, 1919, and my opinion to you of February 27, 1919, both relating to Potomac River licenses.

You first ask whether the fishermen of St. Mary's, Charles and Prince George's Counties must obtain both the Potomac River license (Bagby's Code, Art. 39, Secs. 50 and 51) and the State-wide license (Bagby's Code, Art. 39, Sec. 111). In my opinion, the State-wide license is not required for shad or herring fishing in the Potomac River and its tributaries, but the only license required for such fishing is the Potomac River license, except as to the waters of the Potomac River and its tributaries lying in Charles County, for which provision is made by local laws (Code, P. L. L. 1888, Art. 9, Secs. 66-77).

You also ask whether the State-wide license supersedes the Potomac River license. My opinion is that it does not, as more fully stated in my letter to the Comptroller of January 29, 1919.

I note that the above conclusions are not in accord with what has been the custom in recent years, inasmuch as the Charles County local law has been disregarded and licenses have been taken out upon the basis of the State-wide law; and that you think it would be much more satisfactory if this custom can continue, until the Legislature of 1920 has the opportunity of correcting the discrimination between counties which, you say, will follow from the opinions I have given.

You will recall that before I wrote the Comptroller on January 29, I advised you what my opinion was, and you said that

you agreed with it. If, after considering the matter further, you think that opinion was erroneous, I shall be more than glad to have the benefit of your present views, and change the opinion previously given, if you show me that it was wrong. But nothing now occurs to me to make me feel that that opinion was not correct.

Even if my opinion of January 29 stands, I still do not think that the Commission could be subjected to criticism if you allow the custom of the past years to continue until the Legislature of 1920 can act. I can well understand the difficulties which might be caused by an unexpected ruling on these license laws, changing what has been the construction placed upon them for years; and if you feel that these difficulties may be serious, then I think you would be quite justified in avoiding them by permitting the customary construction to continue for another year, until the next session of the Legislature can correct the trouble.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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CONSERVATION—GAME—REVERSION OF STATE GAME PROTECTION FUND—BUDGET BILL.

January 20, 1919.

W. Thomas Kemp, Esq.,
Chairman, Conservation Commission,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR MR. KEMP: I beg to reply to your favors of January 3rd and 6th, relative to the State Game Protection Fund.

You ask whether any balance of this fund unexpended at the close of the fiscal year reverts. The fund is provided for by the Act of 1918, Ch. 468, Sec. 70. It is made up of moneys received from licenses and fines in the several counties and in Baltimore City, which are credited to a separate fund known as the State Game Protection Fund, which fund is to be disbursed for specified purposes only.

The Court of Appeals has held that whether an unexpended balance reverts or not depends upon the intention of the Legislature.

McMullen vs. Zouck, 130 Md. 541.

In this case the intention is, I think, clear that the unexpended balance shall not revert, but shall be carried down at the beginning of the new fiscal year for the purposes of the Act.

This decision may not now apply to appropriations from the State Treasury made under the Budget Bill, Act 1918, Ch. 206, because Section 2 of that Act provides for the reversion of unexpended balances of such appropriations, but I do not think that a fund composed solely of license fees and fines is money appropriated from the Treasury, within the meaning of the Budget Amendment and the Budget Bill.

For these reasons, I think that any balance of this fund unexpended at the close of the fiscal year does not revert.

The law also provides that after the salaries and expenses of the State Game Warden have been paid, the Conservation Commission shall make "an equitable distribution of said funds among the counties of the State, in proportion to the amounts contributed to said fund by the respective counties," and you ask what becomes of an unexpended balance of the amount apportioned to some particular county, and also, if there is an unexpended balance from the amounts apportioned to all or several counties, whether this can be used, during the next fiscal year, for general game purposes in the State.

I think that any expended balance of the State Game Protection Fund remaining to the credit of any county at the close of the year, should be carried down as a credit to that county. The law contemplates that, except for the salary and expenses of the State Game Warden, the moneys contributed from any county shall go back to and be expended in that county. I think, therefore, that unexpended balances cannot be used for general game purposes in the State.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—GAME—REAPPOINTMENT GAME WARDENS—ACT 1918, CH. 468.

March 17, 1919.

E. Lee LeCompte, Esq.,
State Game Warden,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR MR. LECOMPTE: You ask me whether it is necessary for the Conservation Commission to reappoint deputy game wardens named by it since the passage of Chapter 628 of the Acts of 1916.

I understand that some question has been raised as to whether the appointments made in 1916 were terminated by reason of the passage of Chapter 468 of the Acts of 1918. Previous to the legislation of 1916, deputy game wardens were authorized by Section 46 of Article 99 of the Annotated Code of Maryland. That section authorized the Governor to appoint deputy game wardens upon application by the Game Warden, and provided that such deputy game wardens may be appointed for the State, or for such counties or cities as the Governor designated in the commission. It was also provided that the deputy game wardens should be paid such compensation out of the fines collected, or otherwise, as the Game Warden may agree with them.

Sub-section 3 of Chapter 682 of the Acts of 1916 provided that the Conservation Commission should appoint and issue commissions to such deputy game wardens as may be designated by the State Game Warden. The Legislature did not amend Section 46 of Article 99 of the Code, but authorized the appointment of deputy game wardens to be made by the Conservation Commission instead of by the Governor, as that section provided.

After the passage of the Act of 1916, the Conservation Commission issued commissions to those persons designated by you and appointed by it as deputy game wardens.

Chapter 468 of the Acts of 1918 repealed and re-enacted Section 46 of Article 99 of the Annotated Code. The Conservation Commission was substituted for the Governor, and the Commission was authorized to appoint deputy game wardens for the

whole State, or for counties or cities. It was provided that such deputy game wardens shall not receive a salary from the state, cities or counties, but shall be paid out of the State Game Protection fund such compensation as the Game Warden may agree with them, subject to the approval of the Commission.

Section 46, as amended in 1918, also authorized the appointment of local game wardens in any section or county of this State, and provided that the local game wardens shall receive as their compensation one-half of all fines derived from the prosecution of violators of the game and fish laws arrested by them. The Act of 1918, therefore, created two classes of subordinate game wardens, viz: deputy game wardens and local game wardens, and the compensation of each class is derived from different sources.

If no substantial change in the law authorizing the appointment of deputy game wardens, as it existed when the commissions were issued in 1916, had been made by the Act of 1918, there would be little room for doubt that the commissions issued in 1916 would still be valid. The rule seems to be that where a repealing law contains a substantial re-enactment of the previous law, the operation of the latter continues uninterrupted.

Dashiell vs. Baltimore, 45 Md. 615.

In view, however, of the provisions in Chapter 468 of the Acts of 1918, dividing the appointments made by the Conservation Commission into two classes of officials, each class being put upon a different basis of compensation, I am unable to say that no substantial change in the law has been made.

In my opinion, therefore, the Conservation Commission should proceed to issue new commissions under the Act of 1918, and such commissions, besides designating the political division of the State for which made, should also be made out to deputy game wardens or to local game wardens, as the case may be.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—GAME—STATE GAME PROTECTION FUND—PURCHASE OF FARM.

July 3, 1919.

E. Lee LeCompte, Esq.,
Game Warden,
Conservation Commission,
Baltimore, Maryland.

MY DEAR MR. LECOMPTE: I have your letter of June 12th, in which you state that your department of the Conservation Commission is contemplating the establishment of a state game farm for the rearing of game for distribution in the various counties of the State,—this being, in your opinion, made necessary by the small amount of game which you have been able to secure for propagation purposes during the season of 1919. You ask whether you can purchase and operate a game farm under the provisions of Chapter 468 of the Acts of 1918.

Sections 67, 68, 69, 70 and 71 of Article 99 of the Code, as enacted by Chapter 468 of the Acts of 1918, provide for hunting licenses, the purpose of which is defined in the beginning of Section 67 as that "of providing a fund for the payment of the expenses of protecting and propagating certain birds and animals, and preventing unauthorized persons from killing the same."

Section 70 directs the clerks of the courts collecting the license moneys to transmit them to the Comptroller, after making certain deductions, and the amount so received by the Comptroller is to be placed by him to the credit of a separate fund to be known as "The State Game Protection Fund." This fund is to be disbursed on warrant, signed by the Conservation Commission, and then follows this provision:

> "The moneys in said fund shall be used solely for the salaries and expenses of the State Game Warden and his subordinates, and for the protection and propagation of birds and game of all kinds, the Commission to make an equitable distribution of said fund among the counties of the State, in proportion to the amounts contributed to said fund by the respective counties."

This provision evidently contemplates the distribution, not of the money, but of the birds and game, because there is no

person in the counties who is given authority to receive and use the money.

The present situation, as I understand it, is that there is no method of getting game except by starting a state farm and raising it, and your plan contemplates the establishment of such a state farm with the money in the fund. You think it inadvisable to lease because of the necessary pens and buildings which you would have to place on some other person's property, and you, therefore, wish to purchase a tract of land suitable for the purpose, and on such tract to raise birds and game for distribution among the counties, in proportion to their contributions.

I think the intention of the Legislature was to leave to the judgment of the Conservation Commission the proper method of protecting, propagating and distributing game, and if, in your judgment, this is the proper method, I do not see why you cannot purchase a farm out of the money in "The State Game Protection Fund" and use it for the purposes indicated.

It is my opinion, therefore, that you have this authority. The title to the farm should, of course, be in the State of Maryland.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—GAME—SALE OF RABBITS IN FREDERICK COUNTY.

December 4, 1919.

E. Lee LeCompte, Esq.,
Conservation Commission of Maryland,
512 *Munsey Building,*
Baltimore, Md.

DEAR SIR: I beg to reply to your letter of recent date in reference to Chapter 404, Section 9 of the Acts of 1916. This Department agrees with your view that rabbits killed otherwise than in Frederick County can be sold in that county.

Yours very truly,

PHILIP B. PERLMAN, *Asst. Attorney General.*

CONSERVATION—OYSTERS—LEASE TO MINOR.

April 29, 1919.

Mr. Wm. H. Killian, Secretary,
Conservation Commission,
512 *Munsey Building,*
Baltimore, Md.

DEAR MR. KILLIAN: I beg to reply to your favor of April 25th in which you ask whether a minor can be the lessee of an oyster area.

Numerous sections of Article 72 of Bagby's Code authorize leases of oyster areas to be made by "any residents of Maryland." There is nothing to indicate whether this does or does not include minors who are residents.

There being no prohibition against leasing to minors, it is my opinion that the Conservation Commission has the power to lease to minors, if it deems it wise to do so, and the fact that it does this would not constitute a valid ground for protest.

I take it for granted that the Commission would execute no such lease to a minor unless he was old enough to understand his responsibilities as a lessee. Aside from this, the only objection to such a lease which occurs to me is that under Sections 100, 106 and 107, the relation of landlord and tenant is established between the State and the lessee, and it is possible that your form of lease may impose upon the lessee some obligations which, under familiar rules of law, could not be enforced against a minor.

Crew Levick vs. Hull, 125 Md. 6.

The law, however, requires rent to be paid in advance, and the State's principal remedy for a violation of any of the terms of the lease is to forfeit the same, so that the objection I suggest may not be important, as a practical matter. I leave that, however, for you to decide.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CONSERVATION—STATE GAME PROTECTION FUND—BOARD OF GAME WARDENS FOR ALLEGANY COUNTY.

H. A. Pitzer, Esq., March 31, 1919.
First National Bank,
Mount Savage, Maryland.

DEAR MR. PITZER: I beg to reply to your favors of March 12th and March 20th, in which you say that you were Treasurer of the Board of Game Wardens for Allegany County, which board was created by the Act of 1916, Ch. 282, providing for hunting licenses in Allegany County; that you have over $2,000 in your possession from license fees and fines collected under this Act; and you ask what disposition should now be made of this fund, in view of the Act of 1918, Ch. 468, known as the State-Wide Game Law, which repealed "all general and local laws or parts of such laws inconsistent with the provisions of this Act, and all resident and non-resident hunting license laws now in force, whether general or local."

You enclose an opinion from State's Attorney Roman, to the effect that, notwithstanding the repeal of the Act of 1916 by the Act of 1918, you are still required to dispose of the funds in question in accordance with the terms of the Act of 1916.

The Act of 1918, Ch. 468, became effective on June 1, 1918, and Sec. 70 provides that the several clerks of court "shall *on the first day of June,* 1918, and on the first day of each and every month thereafter," transmit to the Comptroller "all moneys received by them for licenses, after deducting the fees herein authorized," said moneys to be credited to the "State Game Protection Fund," created by the Act; and on May 21, 1918, I advised the State Game Warden that fees collected by the clerks of court, under local hunting license laws, before June 1, 1918, and *in the hands of the clerks on June* 1, 1918, (when such local laws were repealed), should, under Sec. 70 of the Act of 1918, be paid to the Comptroller, in order to form the nucleus of the "State Game Protection Fund."

On June 12, 1918, I advised the State Game Warden that where, as in Cecil County, there existed a County Game Protective Association, authorized by statute, to receive the fees from the clerk of Court and to disburse the same, and when the

fees under the local law had been paid by the clerk to such Association *before* June 1, 1918, that then the same were not payable to the Comptroller, because the Act of 1918 only required local fees collected before June 1, 1918, to be paid to the Comptroller, *if such fees were in the hands of the clerk on June* 1, 1918.

In the case you submit, the license fees were not in the hands of the clerk on June 1, 1918, but had all been paid by him to the Board of Game Wardens for Allegany County before that time. Since the only fees collected by the clerks before June 1, 1918, which the Act of 1918 required to be paid to the Comptroller for the "State Game Protection Fund," were the fees not disbursed by the clerk before June 1, 1918, but which were still in the clerk's hands on that date, and since the fees here in question were not in the clerk's hands on June 1, 1918, it follows that the same are not payable to the "State Game Protection Fund."

The Act of 1918 repealed the *license* provisions of the Act of 1916, Ch. 282, and also any other provisions of the Act of 1916 inconsistent with the Act of 1918, but did not affect the local Board's power and duty, after June 1, 1918, to disburse funds received by it before that date in accordance with the Act of 1916.

In my opinion, therefore, the funds in question should now be disbursed by the Board of Game Wardens for Allegany County for the purposes named in the Act of 1916. These purposes, as stated in Sec. 14B of the Act, are "for protecting and propagating game in Allegany County, and for any incidental expenses as may be incurred by the Board, and for the hunters' licenses and applications, and the clerk of the Court's record book for said licenses."

There are no longer any hunters' licenses and applications or any clerk's record book, under the Act of 1916, because the provisions therefor have been repealed by the Act of 1918, so that the fund should now all be expended by the Board in protecting and propagating game in Allegany County.

I return you State's Attorney Roman's opinion.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CORPORATIONS.

DISSOLUTION BY STATE TAX COMMISSION—PROCEDURE—RECORDING COSTS.

April 4, 1919.

Charles C. Wallace, Esq., Secretary,
State Tax Commission,
Union Trust Building,
Baltimore, Maryland.

DEAR MR. WALLACE: I beg to reply to your recent favor, in which you ask my opinion whether the several clerks of Court are entitled to collect fees from your Commission for recording decrees of dissolution of corporations, passed by your Commission under the Act of 1918, Ch. 198, codified as Section 77B of Article 23 of Bagby's Code, Vol. IV.

This Act authorizes the State Tax Commission to pass an order dissolving corporations having no assets and no debts, and a copy of each such order is required to be sent "for recordation" to the Clerk of Court, where the Charter is recorded, or to the Secretary of State, if the Charter is recorded in his office. The Act provides that accompanying each application, "there shall be a fee of fifteen dollars, out of which shall be paid the cost of advertising, and for the balance the State Tax Commission shall account quarterly to the Comptroller of the Treasury and pay the same to the Treasurer for the use of the State."

The Act, therefore, makes no provision for paying the cost of recording, and, indeed, provides that after paying for the advertising out of the $15.00 deposit, the balance shall be paid to the State.

At the same time, the Act does not provide that the clerks are to do the recording free of charge, and Bagby's Code, Art. 36, Sec. 12, expressly provides that the clerks of Court may charge recording fees; and, of course, it is these and other fees which pay the expenses of the clerks' offices.

Under these circumstances, it seems to me that the clerks of Court are entitled to ask for their recording fees, and as a means of paying the same I think that the Act of 1918, Ch. 198, should be read in connection with Bagby's Code, Art. 36, Sec.

12, so far as the dissolution expenses are concerned, with the result that the State Tax Commission will pay both the advertising and the recording fees out of the $15.00 deposit, and account for the balance to the State.

My opinion, therefore, is that your Commission is authorized to deduct the clerks' recording fees, together with the advertising, from the $15.00 deposit, accounting to the State for the balance.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CORPORATIONS—FOREIGN—ANNUAL FRANCHISE TAX.

November 14, 1919.

Hon. Hugh A. McMullen,
State Comptroller,
Annapolis, Maryland.

MY DEAR MR. MCMULLEN: I have your letter of November 5th, enclosing letter of the Chevrolet Motor Company. It appears from these letters that this company filed its certificate as a foreign corporation on December 28th, 1917, but since that time has not been active in any other way in Maryland.

The question upon which you desire an opinion is whether or not the company should pay the annual franchise tax provided by Sec. 95 of Art. 23 of the Annotated Code. The Company states that it was advised that this office had ruled that a foreign corporation which had filed its certificate in Maryland and had paid the initial tax would not be subject to an annual franchise tax thereafter if it did not actively engage in business in Maryland. I know of no such ruling by this office.

Under Sec. 93 of Art. 23, every foreign corporation which has a usual office or place of business in this State must, before doing business, file with the Secretary of State a certified copy of its charter and an annual certificate showing the name and address of the agent. The Chevrolet Sales Corporation, according to your letter, filed an annual statement for the year 1919. Sec. 95 of Art. 23 provides that every foreign corporation shall, at the time of filing its annual certificate, pay to the State

Treasurer a franchise tax which is based upon the amount of capital employed by it in the State, "but in no case less than twenty-five dollars."

It is my opinion that if the Chevrolet Sales Corporation still keeps an office in this State, it is still obliged, under Sec. 93, to file its annual certificate, and must pay at least the minimum annual franchise tax of twenty-five dollars.

I return you herewith the company's letter, as you request.

Very truly yours,

OGLE MARBURY, *Asst. Attorney General.*

CORPORATIONS—FOREIGN—FRANCHISE TAX—DEDUCTION FOR PROPERTY OWNED IN THE STATE.

March 27, 1919.

Hon. Thomas W. Simmons,
Secretary of State,
Annapolis, Maryland.

DEAR SIR: I beg to reply to your favor of March 22, enclosing letter from Messrs. Piper, Yellott, Hall & Carey, in which they state the case of a foreign corporation doing business in Maryland, which owns in this State land, a building, cash and personal property, and in which they ask whether this corporation is entitled to deduct the value of the same from its capital employed in this State for the purpose of computing the tax due by it under Bagby's Code, Art. 23, Sec. 95, as amended by the Acts of 1918, Chap. 469.

I do not think that this corporation is entitled to such deduction. The tax in question is a franchise tax and the tax on franchises is entirely distinct from the tax on property. Under our laws, both property and franchises may be taxed at the same time.

I return you the letter from Messrs. Piper, Yellott, Hall & Carey.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CORPORATIONS—FOREIGN—FRANCHISE TAX—SURRENDER OF FRANCHISE.

April 5, 1919.

Hon. Thomas W. Simmons,
Secretary of State,
Annapolis, Maryland.

DEAR MR. SIMMONS: I beg to reply to your favor of April 1st, enclosing letter from Angier L. Goodwin, Esq., of Boston, in which Mr. Goodwin says that the H. V. Greene Company, a Massachusetts corporation, ceased to do business in Maryland in November, 1918, closing its branch office here; that the company may in the future desire to re-enter Maryland, and for this reason does not wish to lose its franchise in this State; and Mr. Goodwin asks whether, under these circumstances, the company should pay its annual franchise tax for the current year.

The franchise tax referred to is that provided by Bagby's Code, Art. 23, Sec. 95, as amended by the Act of 1918, Ch. 469, for every foreign corporation, (with certain exceptions), "which maintains an office and regularly exercises its franchises in this State," and the tax is due April 1st.

The company in question has the choice of either (1) surrendering its certificate to do business here and thus relieving itself of the franchise tax, in which event the company, if it desires to re-enter Maryland, will simply have to comply again with Sec. 93 of Art. 23 of Bagby's Code, or (2) of retaining its certificate and paying the franchise tax annually, in which event it can do business in Maryland at any time.

I suppose the company will follow that one of these courses which is the most economical, and if you will send Mr. Goodwin one of your printed copies of the foreign corporation law, I think he will be able readily to decide what to do.

I return you Mr. Goodwin's letter.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CORPORATIONS—FOREIGN—FRANCHISE TAX—COMPANY IN HANDS OF RECEIVERS.

April 14, 1919.

Hon. Thomas W. Simmons,
Secretary of State,
Annapolis, Maryland.

DEAR MR. SIMMONS: I beg to reply to your favor of April 11, enclosing letter from Messrs. Clagett & Thomas, in which they ask whether the Davy Pocahontas Coal Company, a West Virginia corporation, is subject to the franchise tax imposed on foreign corporations by Sec. 95 of Art. 23 of Bagby's code, as amended by the Act of 1918, Ch. 469, in view of the fact that said company is in the hands of receivers, by whom the company's office in this State is being maintained and by whom its business here is being conducted.

I understand that the company has not yet been dissolved in the receivership proceedings, and assuming this to be the case, then, in my opinion, the company is subject to the foreign corporation tax in Maryland, and the same must be paid by the receivers.

It is settled that the appointment of receivers for a corporation does not work its dissolution. A judicial decree is necessary.

Woodland vs. Wise, 112 Md. 35, 37;
Records vs. McKim, 115 Md. 306;
Dietrich vs. O'Brien, 112 Md. 485;
Chemical Bank Co. vs. Hartford Deposit Co., 161 U. S. 1.

As the corporation thus continues to exist, its franchises do also, and, accordingly, franchise taxes are due, notwithstanding the receivership. This has been decided in the following cases:

In re U. S. Car Co., 60 N. J. Eq., 514, (reversing 57 N. J. Eq. 357);
C. & O. Ry. Co. vs. Atl. Trust Co., 62 N. J. Eq. 751;
Hardin vs. Morgan, 70 N. J. Law, 484;

King vs. Amer. El. Vehicle Co., 70 N. J. Eq. 568;
Duryea vs. Amer. Woodworking Machine Co., 133 Fed. Rep. 329;
Conklin vs. U. S. Shipbuilding Co., 148 Fed. Rep. 129.

In the case of Merchants' National Bank vs. Roxbury Rye Distilling Co., United States Circuit Court for the District of Maryland, in which receivers were appointed on February 21, 1910, it was held that the West Virginia franchise tax was a preferred lien on the assets in the receivers' hands.

And in H. Ernest Jenkins vs. Plant and Land Fruit Co., Circuit Court No. 2 of Baltimore City, filed October 4, 1916, it was held that the assets were liable for the franchise tax on capital stock imposed by Bagby's Code, Art. 23, Sec. 88D, notwithstanding the appointment of receivers.

I return you the letter from Messrs. Clagett & Thomas.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CORPORATIONS—FOREIGN—SALE OF STOCK.

July 8, 1919.

Hon. Thomas W. Simmons,
Secretary of State,
Annapolis, Maryland.

DEAR MR. SIMMONS: I beg to reply to your favor of June 27th, enclosing letter from Mr. F. W. Sparks, of New York, in which Mr. Sparks asks whether the Commonwealth Hotel Construction Company, a Delaware corporation, must comply with the Maryland foreign corporation law before soliciting subscriptions to its shares of stock in this State.

The Maryland foreign corporation law (Bagby's Code, Art. 23, Sec. 93) applies only to foreign corporations "doing business herein". If the corporation in question simply sells its

shares of stock in Maryland, then it is not doing business in this State, and, therefore, is not required to comply with our law.

Baden vs. Wash. Loan & Trust Co., Court of Appeals, Jan. 16, 1919, Daily Record, April 3, 1919.

I return you Mr. Sparks' letter.

This will answer your letter of July 2nd on the same general subject.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CORPORATIONS—FOREIGN CONSTRUCTION COMPANIES.

December 9, 1919.

Atlantic Bridge Company,
Latta Arcade Building,
Charlotte, N. C.

R. P. Coble, Esq., Secy & Treas.

DEAR SIR: I have your letter of December 5th addressed to the Attorney General.

Under Sec. 93 of Art. 23 of the Annotated Code of Maryland, annual certificates and a certified copy of the charter must be filed by

> "* * * every foreign corporation which has a usual office or place of business in this State, except insurance companies hereinafter provided for, but including any corporation which is engaged in this State permanently or temporarily and with or without a usual place of business therein, in the construction, alteration, erection or repair of any building, bridge, railroad, railway or structure of any kind * * *."

You will see by this quotation that a bridge company such as yours engaged in work authorized by your charter, must comply with the Foreign Corporation Law of Maryland whether it has a usual office or place of business in Maryland or not.

In addition to this provision, it is provided by the Act of 1916, Ch. 704, Sec. 184, that

> "* * * each foreign construction company, firm or person with its chief office outside of this State operating or doing business in this State directly or by agent or by sub-letting contract, shall, before doing so, take out a license therefor and pay an annual license fee of $50 if operating in the City of Baltimore and a like amount of $50 in each county of this State in which said person, firm or corporation shall operate * * *."

This latter section does not apply to corporations doing a construction business, the gross amount of whose orders accepted and executed does not exceed $5,000 per year.

Very truly yours,

OGLE MARBURY, *Asst. Attorney General.*

CRIMINAL LAW.

ALLOWANCE TO STATE LUNACY COMMISSION FOR EXAMINATION OF ACCUSED.

May 13, 1919.

Dr. A. P. Herring, Secretary,
State Lunacy Commission,
330 *N. Charles Street,*
Baltimore, Maryland.

DEAR DR. HERRING: I am in receipt of your favor of May 8th with reference to the Commission's bill in connection with the examination and trial of Dr. Ishida.

I understand that the Circuit Court has allowed fees to the members of the Commission for their examination of Dr. Ishida, but had declined to allow fees for their testimony at the trial.

The allowance of fees in cases of this kind is regulated by the Act of 1918, Ch. 68, codified in Bagby's Code as Sec. 16, of Art. 59. From a reading of this section and also Secs. 6 and 44 of Art. 59, it seems to me reasonably clear that the services for which the members of the Commission are entitled to a fee, are services in connection with the examination of an accused person, and not services for testifying in Court. Moreover, as the Court points out, the members of the Commission declined to testify at the trial as experts, and the Court sustained them in this.

It is therefore my opinion that the Court's finding was correct, but even if I thought otherwise, questions relating to Court costs are for the Court to decide, and the Court having decided it, my opinion could not alter the result.

I return you the correspondence on the subject, which you sent me.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CRIMINAL LAW—COMMITMENT IN DEFAULT OF FINE WHERE ACT CREATING OFFENSE DOES NOT SO PROVIDE.

William H. Killian, Esq., January 20, 1919.
Conservation Commission,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR MR. KILLIAN: I beg to reply to your favor of January 13th, in which you ask whether a person convicted of violating Sec. 68C of Art. 72 of Bagby's Code, and who has been fined therefor, can be committed to jail for non-payment of his fine. This section relates to the culling of oysters, and the doubt arises because of the fact that the only penalty provided for is a money fine, and also because the statute provides that "the boat or vessel on which said oysters are found shall be held as security for the payment of said fine."

Neither of these circumstances prevent commitment to jail for non-payment of the fine. If, however, the accused is committed for non-payment of his fine, then he is entitled to his release after he has remained in custody for the period of time specified in Bagby's Code, Art. 38, Sec. 3, and upon his discharge in conformity with this law, the boat, if it has been held as security, should, I think, also be released.

See Dean vs. State, 98 Md. 80, in connection with the Act of 1900, Ch. 380, Sec. 8 (Bagby's Code, Art. 72, Sec. 11), which was before the Court in that case.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CRIMINAL LAW—COMMITMENT OF JUSTICE OF THE PEACE IN DEFAULT OF FINE.

Henry Wilkinson, Esq., October 13, 1919.
Justice of the Peace,
Ridgely, Maryland.

MY DEAR MR. WILKINSON: I have your letter of September 26th in which you ask what can be done with a party tried and fined $25.00 and costs before you, who was permitted to leave

after the trial upon the understanding that he would pay the fine and costs within a few days. He did not do so, and you wish to know whether you can commit him to jail in default of payment. The trial took place on January 25th, 1919.

Your term of office has not yet expired, and you still have this case before you unsettled. I think it is clearly within your power to commit the party convicted to jail for non-payment of his fine and costs in the same manner as this could have been done at the time of trial.

Very truly yours,

OGLE MARBURY, *Asst. Attorney General.*

CRIMINAL LAW—JURISDICTION OF JUSTICES OF PEACE—FALSE PRETENSES—ASSAULT ON WIFE—PROCEDURE ON REQUEST FOR JURY TRIAL—INDICTMENT UNDER GALLON-A-MONTH LAW.

February 4, 1919.

William G. Kerbin, Esq.,
State's Attorney,
Snow Hill, Maryland.

DEAR MR. KERBIN: I beg to reply to your favor of recent date.

You first ask whether a justice of the peace has jurisdiction to try offenses under Sec. 122 of Art. 27 of Bagby's Code. This section provides for the crime of false pretenses, and the punishment is fine and imprisonment, or confinement in the penitentiary. Justices cannot try offenses under this section, because Bagby's Code, Art. 52, Sec. 12, excepts cases punishable by confinement in the penitentiary from the criminal jurisdiction of justices of the peace.

You also ask whether a justice of the peace has jurisdiction to try offenses under Sec. 15 of Art. 27, of Bagby's Code, relating to assault on wife. In my opinion, the justice has jurisdiction in such cases, for the reasons set forth in my opinion on the same subject to Mr. Oliver H. Bruce, Jr., of November 10, 1917, Attorney General's Opinions, Vol. 2, page 126.

You next ask whether the justice, when the accused prays a jury trial, sends the case, under Sec. 12 of Art. 52 of Bagby's Code, to Court on an appeal, or holds the accused for the Grand Jury. In such case there is no trial before the justice, and, therefore, there is not, properly speaking, an appeal. The statute, however, requires the case to be put upon the appeal docket, and the accused, in the counties, is not held for the action of the Grand Jury, but is either committed for trial or held to bail for trial, the papers being transmitted to Court, and the case being there tried on the information or warrant, as the statute directs. This was recognized as the proper procedure in Starliper vs. State, 126 Md. 295.

Finally, you ask what should be the form of indictment against a railroad agent who delivered a package of whiskey to a person other than the consignee, knowing that he was not the consignee, in violation of the Act of 1914, Ch. 831, known as the gallon-a-month law. The indictment should simply follow the statute, and allege in substance that the agent delivered the whiskey to a person other than the person to whom the same was consigned, contrary to the Act. You can add, if you wish, that the agent knew that the person to whom he made delivery was not the consignee, although I hardly think this necessary, because the question of the agent's knowledge would be matter of defense.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CRIMINAL LAW—PAYMENT OF FINE TO JUSTICES OF THE PEACE BY BAD CHECKS—COMMITMENT TO JAIL IN DEFENSE.

February 3, 1919.

E. Lee LeCompte, Esq.,
State Game Warden,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR MR. LECOMPTE: I beg to reply to your favor of January 30th.

You say that a certain Charles Williams, of Hancock, Md., pleaded guilty before a justice of the peace to the charge of hunting without license, was fined by the justice, and gave his check to the justice in payment of the fine, but stopped payment thereon before the same was cashed. Mr. Williams then requested an appeal, which the justice refused to grant, and afterwards the justice entered suit against Mr. Williams on the check, and secured judgment. Mr. Williams appealed from this judgment.

You ask what should now be done to secure payment of the fine. The procedure is perfectly clear. There was no occasion to sue upon the check, and this suit should be abandoned. Mr. Williams having stopped payment, was in the same position he would have been in had he not given any check, and he should have been committed to jail for non-payment of his fine, in accordance with Bagby's Code, Art. 38, Secs. 1 and 3. This is the course which should be followed now.

You also ask whether Mr. Williams could appeal from the judgment entered against him upon his plea of guilty. Whenever the accused, voluntarily and with a full understanding of its effect, pleads guilty, he has no right of appeal.

State vs. Darling, 130 Md. 251, 254;
Lowe vs. State, 111 Md. 1.

I assume that Mr. Williams' plea of guilty was made under these circumstances, and, if it was, he has no right of appeal from the judgment imposing the fine.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

CRIMINAL LAW—SHIPMENT OF LIQUOR TO WASHINGTON COUNTY—ACT 1916, CH. 30.

Omer T. Kaylor, Esq., March 17, 1919.
State's Attorney,
Hagerstown, Maryland.

DEAR MR. KAYLOR: I beg to reply to your favor of March 13th, in which you ask whether a railway company may accept shipments of intoxicating liquors for delivery in Washington County, when such shipments are sent pre-paid and are not delivered by the railway company, but are called for, and when the same are intended for personal consumption by the consignee.

The question is controlled by the Act of 1916, Ch. 30, which was duly adopted as to Washington County by the voters of that county.

Sec. 5 of this Act makes it unlawful, among other things, for any corporation to "transport for sale, dispense or otherwise dispose of" any intoxicating liquors, and any corporation "transporting, dispensing or disposing of" the same is made subject to penalty.

The case you submit is, I think, not affected by the fact that the railway company delivers the shipment only when called for, but the question is whether the statute applies, in view of the fact that the shipment is intended for personal consumption, and not for sale.

The statute first prohibits transportation *for sale,* and then penalizes the *mere transporting,* without reference to whether this is for sale or not. If the former prohibition controls, the shipment you mention, being for personal consumption and not for sale, is not unlawful; and if the penalizing clause controls, the shipment, of course, is unlawful.

There is room for either construction, and the question is too doubtful for me to advise you with any degree of certainty which would prevail. This is one of those cases in which, if the situation warrants it, appropriate proceedings will have to be brought to test the question.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General*

CRIMINAL LAW—TRIAL BY JURY IN CASES OF PROSECUTION FOR CATCHING UNDERSIZED FISH.

March 19, 1919.

E. Lee LeCompte, Esq.,
State Game Warden,
512 *Munsey Building,*
Baltimore, Maryland.

DEAR MR. LECOMPTE: I beg to reply to your favor of March 18th, in which you ask whether persons accused in Baltimore County of violating Sec. 79 of Art. 39 of Bagby's Code, prohibiting the catching of undersized fish, can elect a trial by jury, in lieu of a trial before the justice.

In my opinion, they can. By Sec. 84 of Art. 39 justices of the peace are given jurisdiction to try offenses of this kind, and by Sec. 316 of the Baltimore County Code of 1916, (which is substantially the same in this respect as Sec. 12 of Art. 52 of Bagby's Code), the accused is given the right to be tried by a jury, if he so elects, instead of by the justice.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

EDUCATION.

School on Government Reservation.

July 31, 1919.

Dr. M. Bates Stephens,
State Superintendent of Schools,
Baltimore, Maryland.

My Dear Dr. Stephens: You have asked my opinion on certain phases of the proposition suggested to the Board of Education of Cecil County by the Public Health Service of the United States Government, in the matter of a school on the government reservation on Perry Point, Perryville.

I understand that the title to the reservation is in the United States. There is now a fine school building upon this reservation which the Public Health Service has offered to the County Board. The proposition includes the combination of this school with the school at Perryville.

Where land is purchased by the United States, the consent of the State within which it is located is necessary. The State of Maryland has given a general consent by the enactment of Art. 96 of the Annotated Code. The only jurisdiction retained by the State in this article is that of going upon the land and serving process. It follows, therefore, that there is no obligation upon the State or county to provide school facilities for children resident on the reservation.

On the other hand, if it is for the benefit of children in Cecil County to use this school building and the county board of that county so desires, there is no reason why they cannot use it and permit children resident on the reservation to attend it. I understand there is no question of purchasing the land, and the whole matter resolves itself into the location of a county school, or a graded high school, as the case may be. While the matter is not entirely free from doubt, yet, in my opinion, under these circumstances, the County Board of Education, if it so desires, may locate its school on the reservation.

Very truly yours,

Albert C. Ritchie, *Attorney General.*

EDUCATION—USE OF THE GENERAL SCHOOL FUND BY THE COUNTY BOARD OF EDUCATION.

December 3, 1919.

M. S. H. Unger, Esq.,
Superintendent of Schools,
Westminster, Md.

DEAR SIR: I have your letter of November 14th in which you state you desire a ruling on the question whether the Board of Education of Carroll County has the discretionary right to determine to what purposes the undistributed $34,000 of State money may be directed.

Neither your letter nor the statement which you enclose issued by your Board for the information of the public gives sufficient information for me to answer your question definitely. I assume, however, that the $34,000 which you mention is part of the general school fund which you receive from the State, and it is upon this assumption that I am answering your inquiry.

Sec. 26 of Art. 77 of the Code (Vol. 4), provides for the County Budget. In making up this County Budget the County Boards of Education are to include in it not only the amount which will be needed for the succeeding school year, and the amount which they consider will be needed to be raised by local taxation, but they are also to put in this Budget "the estimated total amount that will be received from the State which shall be used for paying teachers' salaries and purchasing text books, materials of instruction and school supplies."

It is quite clear from this section that the general school fund which you receive from the State can be used only for paying teachers' salaries and purchasing text books, materials of instruction and school supplies. It is within the discretion of your Board of Education to determine how the money shall be distributed as between teachers' salaries and the purchasing of text books, etc.; but it is not within your Board's discretion to use the money for any other purposes than those specifically mentioned in the Act of the Legislature.

You will, of course, appreciate that the Attorney General is not the official adviser of your Board, although we are glad to give you our opinion if you desire it.

You will also recall that to some extent at least the State Superintendent of Schools is, by the provisions of Section 19 of Article 77, required to explain the true intent and meaning of the school laws.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

ELECTIONS.

AFFILIATION—METHOD OF CHANGING—NOTICE TO VOTERS ON SUSPECTED LIST.

August 9, 1919.

James A. Young, Esq.,
The Board of Supervisors of Elections,
Cumberland, Md.

MY DEAR MR. YOUNG: I have your letter of August 7th in which you ask what is the correct way to change party affiliation.

Article 33, Section 186 of the Annotated Code, provides that a person registered as affiliated with a political party may appear before the Board of Registry at any intermediate registration and make, alter or strike out any entry in the column headed "Party Affiliations" opposite his name in the Registry. Section 182, however, provides that no person, after having had his affiliation registered, shall be permitted to make any change in such affiliation unless the change be made six months prior to the day of the Primary election. No change in affiliation can be made, therefore, at the registration before the next Primary, although persons not registered as affiliated can affiliate at the time of such registration. Persons now affiliated, who desire to change their affiliations, can do so by appearing before their respective Boards of Registry on the registration days before the next general election.

You also ask whether a person whose name is upon the list of suspected persons should have actual notice by the officers of registration, or whether a notice sent by mail is sufficient. Section 21 of Article 33 provides for a notice by mail to the address as given in the Registry, and also for a similar notice to be served, and if the person cannot be found at the place designated upon the Registry, the notice may be left there if such place can be found. It is not necessary to hunt up the man personally, but it is necessary for the officers of registration to go to his address appearing upon the Registry, and if they find it, to serve notice upon him there, or leave a notice there if he is not there.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—AFFILIATION NECESSARY FOR CANDIDATE IN PRIMARY—REGISTERED DEMOCRAT IN REPUBLICAN PRIMARY.

August 9, 1919.

Clarence M. Roberts, Esq.,
Attorney for Supervisors of Elections,
Upper Marlboro, Md.

DEAR MR. ROBERTS: I have your letter of August 5th in which you ask whether a man registered as an Independent can file a certificate and become a candidate in the Primaries.

Article 33, Section 184, prescribes the requirements of the certificate which must be filed by a person seeking a nomination before the Supervisors of Elections can put his name upon the ballot. Among the requirements of such certificate is a statement of the party to which he belongs. Section 182 provides that no one who is not recorded upon the Registry as affiliated with a particular political party will be qualified to vote at the Primary elections of that party. It seems clear that the statement in the candidate's certificate is intended to mean the party with which he is affiliated, as this is the test of his right to vote in the Primaries of that party. One who is registered as an Independent has not affiliated with any party, belongs to no party within the meaning of the elections laws, and cannot therefore file a proper certificate with the Supervisors of Elections to entitle his name to be placed upon the ballot as a candidate of any political party.

You also ask whether a registered Democrat can file a certificate and have his name placed upon the ballot as a candidate of the Republican party. What I said in reference to the Independent voter also applies in this case. The registered Democrat has an affiliation which he cannot change before the Primaries, he cannot vote in the Primaries of any other party, nor can he become a candidate of any other party than that with which he is affiliated.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—BALLOTS—CROSS-MARKS OPPOSITE BLANK SPACES.

October 20, 1919.

Benjamin F. Sterling, Esq.,
Judge of Election,
Crisfield, Md.

MY DEAR MR. STERLING: I have your letter of October 18th in which you ask what should be done during the count of ballots with a ballot in all other respects marked properly which has a cross-mark in the square opposite a blank line reserved for the voter to write in the name of some person not on the ticket for whom he wished to vote, there being, however, no name written in this blank line.

In my opinion this ballot should be rejected.

Section 73 of Article 33 of the Code provides as follows in respect to the duties of judges in the count of ballots:

> "* * * if there shall be any mark on the ballot other than the cross-mark in a square opposite the name of a candidate, or other than the name or names of any candidate written by the voter on the ballot as provided in Section 54, such ballot shall not be counted."

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

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ELECTIONS—BALLOTS—NUMBER OF COLUMNS ON THE BALLOT—DISCRETION OF THE SUPERVISORS.

October 16, 1919.

Charles E. Tucker, Esq.,
The Board of Supervisors of Election,
Centreville, Md.

DEAR SIR: I have your letter of October 15th in which you state that you have the names of 29 candidates to be placed upon the ballot in Queen Anne's County, representing 14 groups, requiring 14 headings and 19 blank spaces. If you place all these

names in one column, the ballot will be 36 inches in height. You wish to know whether you can make two columns instead of one.

Article 33, Section 55 provides in part as follows:

> "All candidates for office shall as far as possible be placed in one column, but when the names to be printed upon the ticket are over 36, then another column shall be added in which names shall be printed, and when two or more columns are used the same number of names shall, as far as possible, be printed in each column."

In my opinion this means that when there are over 36 names, the ballot *must* be in two columns, but when there are less than 36 names, one column shall be used, if practicable, but if not practicable, the Supervisors have it within their discretion to prepare a ballot containing two columns. Under the circumstances which you set out, I think your Board has the right to prepare a two column ballot.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

ELECTIONS—CANDIDATE IN PRIMARY MUST BE REGISTERED VOTER.

July 31, 1919.

Clarence M. Roberts, Esq.,
Upper Marlboro,
Maryland.

DEAR MR. ROBERTS: I have given additional consideration to your letter of recent date, in which you asked my opinion whether Mr. Thomas H. Wildman can lawfully enter the Republican primary this fall as candidate for the Republican nomination for Sheriff of Prince George's County. Mr. Wildman, I understand, was formerly a non-resident of the State and filed his Declaration of Intent on October 31st, 1918.

Bagby's Code, Art. 33, Sec. 184, provides that before a candidate's name may be printed on the primary ballot, he must have filed a certificate stating, among other things, the "place where he is a registered voter" and "the party to which he be-

longs." Since Mr. Wildman is not now a registered voter, and cannot become one until the Tuesday preceding the primary, he is not able, of course, to comply with these conditions. He is, therefore, not eligible, in my opinion, to enter the Republican primary.

My opinion is that Mr. Wildman is entitled to register on the Tuesday preceding the primary and to vote in the primary. He is entitled to vote in the general election in November (see 2 opinions of the Attorney General, p. 176), and Sec. 17A of Art. 33, provides for the registration of those "who may be entitled to vote at the next General Election."

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—CANDIDATE IN PRIMARY FOR TWO OFFICES.

August 22, 1919.

Hon. Jesse D. Price,
Salisbury,
Maryland.

MY DEAR SENATOR: I have before me your letter of August 19th, which I am answering in the absence of Mr. Ritchie.

Under the provisions of Sec. 184 of Art. 33, which is the section of the Election Laws providing for the preparation of the ballots for primary elections, the Supervisors of Elections must print upon the ballot the names of all candidates who become qualified by the payment of the amount set out in that section, and by the filing of a certificate therein minutely described.

There is nothing in this section to prohibit a person from filing a certificate for two or more offices, and if this is done it is the duty of the Supervisors to place his name upon the ballot as a candidate for both offices.

Section 45, which refers to nomination by certificate or petition, provides that no person shall accept a nomination to more than one office, and it is probable that if the gentlemen in your county who has filed for the offices of state senator and county treasurer should receive the highest number of votes

for both offices, he would be compelled to choose between the two before the Supervisors could put his name upon the ballot at the general election as the candidate of his party. This question, however, has not yet arisen and there is nothing in the election law which prohibits his being a candidate for nomination for more than one office. With kind regards, I am

Very truly yours,

OGLE MARBURY, *Asst. Attorney General.*

ELECTIONS—CONDUCT IN POLLING PLACE AT THE COUNT OF BALLOTS.

October 13, 1919.

Mr. D. E. Bolden,
Oakland,
Maryland.

MY DEAR MR. BOLDEN: I have your letter of October 3rd, in which you ask what is the right of the public to congregate in the voting room at the polls after all votes have been cast, and when the counting begins.

It is certainly entirely within the province of the election officers to see that the public does not, in any way, interfere with the counting. You will find this right specifically set out in Sec. 71 of Art. 43 of the Code, where the judges of election are given the right to station officers in the room in order to keep the peace. The only people whom they cannot keep at a distance are the challengers and watchers. I do not think, however, that the count should be secret or out of the sight and hearing of the public. The public, however, can certainly be kept quiet and be made to refrain from any interference whatever with the election officials in the performance of their duties.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

ELECTIONS—DIVISION OF DISTRICT INTO PRECINCTS.

September 17, 1919.

Benjamin H. Sincell, Esq.,
Clerk, Board of Supervisors of Elections,
Oakland, Garrett County, Md.

MY DEAR SIR: I have your letter of September 13th, in which you ask by direction of your board for an opinion as to the division of one of the election districts of your county into two voting precincts.

This subject is fully covered by Sec. 127 of Art. 33 of the Code. You can find in this section all the information you need on the subject. It is, of course, too late to establish any new precincts this year, as the boundaries of such precincts must be advertised once a week for three successive weeks before the first day of September in the year in which the subdivision is made.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

ELECTIONS — ELECTION SUPERVISORS CANNNOT DELEGATE POWER TO ADMINISTER OATHS TO ELECTION OFFICIALS.

July 25, 1919.

W. G. Gott, Esq.,
Counsel to Board of Election
Supervisors of Anne Arundel Co.,
Annapolis, Maryland.

DEAR MR. GOTT: I beg to reply to your favor of July 23rd, asking my opinion whether the Board of Election Supervisors can lawfully delegate to the clerk the power to administer oaths to judges and clerks of elections.

I think it quite clear that this cannot be done. Secs. 10 and 11 of the Election Laws provide that the judges and clerks are to be sworn in by the supervisors themselves, or by a justice of the peace or a notary public. Sec. 6, which provides for the clerk to the board, does not give the clerk any power to admin-

ister oaths, and, of course, no one can administer oaths unless authorized to do so by statute. Therefore, the supervisors cannot delegate this power to the clerk.

If, however, the clerk happens to be either a justice of the peace or a notary public, then I think that he could swear in the judges and clerks under Sec. 10, but he would do this in his capacity as justice of the peace or notary public, and not by virtue of any delegation of authority to him from the board.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS — ELIGIBILITY OF COUNTY ROAD DIRECTOR AS JUDGE OF ELECTION.

May 20, 1919.

Clarence M. Roberts, Esq.,
Attorney to the Board of Supervisors of Elections,
Upper Marlboro, Md.

MY DEAR MR. ROBERTS: I have before me your letter of May 17th addressed to Assistant Attorney General Marbury, in which you ask for an official opinion whether a road director of Prince George's County is eligible for appointment as a registration judge of election.

The qualifications of judges of elections are set out in Sec. 7 of Art. 33 of the Code. One of these qualifications is that such judge shall be a man "not holding any other public office or employment, and not a candidate for any office at the next election."

A road director under your local law (Acts of 1916, Ch. 586) is a public employee, must devote his whole time to his duties, and receives a salary from the county. In my opinion, he holds public employment, and therefore is ineligible as a judge of election.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—JUDICIAL PRIMARIES—ASSOCIATE JUDGES FROM THE SAME COUNTY.

August 23, 1919.

Mr. Franklin H. Ankeney, President,
Board of Election Supervisors,
Cumberland, Md.

DEAR MR. ANKENEY: I beg to reply to your telegram which I received this morning, in which you refer to the fact that there are two vacancies for Associate Judge in your Circuit to be filled this fall, and that three Republican candidates have filed their papers to fill these vacancies. One of these, Judge Henderson, lives in Allegany County, and the other two, Mr. Wagaman and Mr. Brindle, both live in Washington County. Under these circumstances, you ask my opinion whether, under Section 188 of the Election Laws, a certificate of nomination can be issued to Judge Henderson without placing his name upon the ballot, and thus reduce the primary for these positions to a contest between Mr. Wagaman and Mr. Brindle.

If Judge Henderson is entitled to a certificate of nomination without entering the primary, then this can only be because of Section 21 of Article 4 of the Constitution, which provides that no two Associate Judges for any circuit, except the third circuit, "*shall at the time of their election* or appointment, or during the term for which they may have been elected or appointed, reside in the same county."

This provision of the Constitution clearly applies to the general election, and not to the primary election. The prohibition is against two Associate Judges residing in the same county *at the time of their election.* There is no prohibition against two primary candidates for Associate Judge residing in the same county at the time of the primary. Indeed, the subsequent provisions of Section 21 of Article 4 of the Constitution quite clearly recognize that two or more candidates for Associate Judge may come from the same county, because this section expressly provides that if they do, then "that one only in said county shall be declared elected who has the highest number of votes in the circuit." It seems to me clear, therefore, that the names of all three of the candidates should go upon the primary

ballot, and that the two of them, who at the primary receive the highest and the next highest number of Republican votes cast in the Circuit should be declared the nominees of the Republican party.

It is, of course, true, that if Mr. Wagaman and Mr. Brindle are the nominees, and if at the General Election Mr. Wagaman and Mr. Brindle (both continuing their residence in Washington County), receive the highest and the next highest number of votes cast in the Circuit, then both could not be declared elected Associate Judge, because this would result in two Associate Judges coming from the same county, which the Constitution forbids. In this event, the one receiving the highest number of such votes would be the only one elected, because the Constitution in express terms declares that if two or more candidates for Associate Judge do come from the same county, then *"that one only in said county shall be declared elected who has the highest number of votes in the Circuit."*

Nevertheless, I can find no justification for holding that a certificate of nomination can be issued to Judge Henderson. The only possible justification for this is in the constitutional provision above referred to, and that, as I have already said, does not apply to a Primary election, but applies only to a General election. *It prohibits two candidates from the same county being declared elected,* but has nothing to do with the number or the residence of those who wish to be candidates. Indeed, this section of the Constitution itself contemplates that there may be two candidates from the same county, because it provides that if there are, then only the one receiving the highest number of votes shall be declared elected. The Constitution thus contemplates the exact situation which would result if both Mr. Wagaman and Mr. Brindle were nominated, and in view of this, I do not see how I can make a ruling which would deprive one or the other of these two gentlemen of the possibility of being nominated, as would be the case if I held that Judge Henderson should receive the certificate of nomination without a primary.

I am sending a copy of this opinion to Judge Henderson, because in case he or his friends do not agree with it, then I want them to have every opportunity to test its correctness.

This, I think, could readily be done by appropriate proceedings to prevent the Supervisors, if they adopt this opinion, from putting Judge Henderson's name upon the primary ballot.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

(Note.—See Attorney General's Opinion, Vol. 2, p. 157.)

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ELECTIONS—NOMINATION BY PETITION—INDEPENDENT CANDIDATE.

October 8, 1919.

Clarence M. Roberts, Esq.,
Attorney to Supervisors of Elections,
Upper Marlboro, Md.

DEAR SIR: I understand from you that a petition has been filed with your Board, signed by the requisite number of voters, nominating John M. Bowie as a candidate for County Commissioner. This certificate of nomination states that the party or principle which Mr. Bowie represents is "independent Republican." You ask what is the duty of your Board in the matter.

Section 43 of Article 33 provides for nomination by such a petition. The certificate to be filed under that section must contain such information as is required to be given in certificates of nominations made by a convention or primary meeting under Section 42 of the same article.

Section 42 of Article 33 prescribing the contents of the certificate of nomination states that it shall designate "not in more than one word" the party or principle represented.

Under these circumstances I do not think that Mr. Bowie can be placed upon the ticket as an "Independent Republican."

Section 55 of Article 33 provides for the form and the arrangement of the ballots. By that section the Supervisors are directed to place the name of his political party to the right of the name of the candidate, "but if there shall have been any nomination for the same office by a convention or primary election claiming the same party named, duly certificated as hereinbefore provided, there shall then be printed to the right of the

name of the candidate so nominated in accordance with Section 42, except Presidential electors, only the word 'independent' and no other."

Under this provision, there having been nominated by the Republican party in its primary in Prince George's County two candidates for the two vacancies to be filled at the coming election in the Board of County Commissioners, it seems to me that it is the duty of the Board of Supervisors to print Mr. Bowie's name upon the ballot as a candidate for the office of County Commissioner, and to the right of his name to print the word "independent."

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

ELECTIONS—PETITION OF INDEPENDENT CANDIDATE—AFFIDAVIT—DEPOSIT.

October 14, 1919.

Henry L. Constable, Esq.,
Elkton, Maryland.

MY DEAR MR. CONSTABLE: I have your letter of October 11th in which you ask whether an affidavit to a petition of an independent candidate must be made before a Justice of the Peace, or whether it can be made before other officers authorized to take an affidavit. Section 43 of Article 33 specifically requires the affidavit to be made before a Justice of the Peace by one or more persons known personally to the Justice, and so certified by him and signed by the affiant or affiants.

I think this section should be strictly construed that the affidavit must be made before a Justice of the Peace in as much as he is required not only to administer the oath, but also must personally know the parties. I think the Legislature indicated by saying a "Justice of the Peace" that it intended to exclude other officers permitted to administer oaths, and it is very probable that a Justice of the Peace was selected because of the more than usual knowledge such an officer has of persons in his neighborhood.

You also ask whether an independent candidate is required to deposit with the Board of Supervisors of Elections the sum of $25.00 as if he were a candidate in the primary. The requirement for the $25.00 is contained in Section 124, and is made only of candidates for nomination for public office "at a primary election." There is no such requirement under Section 43 which provides for nomination otherwise than at a primary election. It is therefore clearly not necessary for the independent candidate to make the $25.00 deposit.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

ELECTIONS—PRIMARY—RESIGNED MEMBER OF BOARD OF SUPERVISORS CAN BE CANDIDATE.

September 2, 1919.

C. Frank Crow, Esq.,
Board of Supervisors of Elections,
Chestertown, Md.

DEAR SIR: I am asked whether a member of the Board of Supervisors of Elections can become a candidate in the primaries for the State Senate, provided that upon becoming a candidate he resigns from the Board. In my opinion he can. I gave an opinion some time ago to the effect that a member of the Board of Supervisors of Elections cannot become a candidate for office in the primaries if he continues to act as supervisor, because the law does not contemplate that a Supervisor of Elections should be a candidate at a primary election which he himself is charged with the duty of conducting and canvassing, and also, in case of a contest, of recounting and recanvassing. (Op. Atty. Gen., Vol. 2, p. 180.)

It seems to me that these objections are removed by the resignation from the Board of the candidate. I do not think that the fact that the candidate, when Supervisor, helped to appoint the judges and clerks of election disqualifies him, since it will not be presumed that these officials are incapable of discharging their duties fairly and honestly.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—PUBLICATION OF NOTICE OF REGISTRATION—DISCRETION OF SUPERVISORS OF ELECTIONS.

May 20, 1919.

Winston G. Gott, Esq.,
Lee Building,
Annapolis, Md.

MY DEAR MR. GOTT: I have your letter of May 14th, in which you state that there are three newspapers published in Anne Arundel County, all of which are of the democratic political faith. Two of these papers, namely, the "Weekly Advertiser" and the "Daily Advertiser" are published by the Annapolis Publishing Company under one ownership and one manager. A third paper, the "Evening Capital," is published by the Capital Publishing Company. You ask what are the duties of the Board of Supervisors of Elections of Anne Arundel County in the matter of the publication of the time and place of registration under these circumstances.

Section 14 of Article 33 of the Code provides that the Board of Supervisors of Elections shall give ten days' notice of the time and place of registration by hand bills, "and also in the counties, by advertisements in two newspapers (one of which newspapers, if possible, shall be of opposite political faith from that of the majority of said Supervisors) of general circulation therein" * * * As there are no republican newspapers in Anne Arundel County, it is not possible to publish the advertisements required in a republican paper. The only other requirement is that the newspapers shall be of general circulation. There is no provision as to the necessity of separate ownership.

Under these circumstances, I think it is entirely within the discretion of the Board of Supervisors of Elections of Anne Arundel County to determine in which of the three newspapers of general circulation in Anne Arundel County the publication of the registration notice should be made.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—RE-ADJUSTMENT OF PRECINCTS IN BALTIMORE COUNTY—ACT 1918, CH. 82.

May 13, 1919.

Hon. Carville D. Benson,
1301 *Fidelity Building,*
Baltimore, Md.

DEAR SIR: You ask me whether the Board of Supervisors of Elections of Baltimore County may add the portion of the first and the second precincts of the fourteenth district remaining in the county after the passage of the Annexation Act to the portion of the fourth precinct remaining in the county, and then sub-divide the fourth precinct as amended into three new precincts.

As I understand it, the portion of the fourth precinct remaining in Baltimore County contains 500 and some odd voters; the portion of the first precinct now in the county has approximately 200 voters, and the portion of the second precinct approximately 400 voters. I also understand that the polling places of the first and second precincts existing before the passage of the Annexation Act were located in territory brought within the limits of Baltimore City.

Section 7 of Chapter 82 of the Acts of 1918 provides that the Board of Supervisors of Elections of Baltimore County are directed to provide new polling places for, or to so amend their election precincts as to include within existing election precincts, all registered voters residing in Baltimore County outside the limits of Baltimore City as fixed by the Act, and whose polling places were located within the territory annexed to Baltimore City. The power to amend election precincts as to include within existing election precincts the registered voters whose polling places were annexed to Baltimore City, conferred upon the Board of Supervisors of Elections by the Annexation Act, gives it the authority to add the portions of the first and second precincts remaining in Baltimore County to the fourth precinct, the polling place of which was not annexed to the City.

When the Board adds the portions of the first and second precincts remaining in Baltimore County to the portion of the fourth precinct left in the county, then the fourth precinct will

contain more than 1,100 voters. Section 127 of Article 33 of the Annotated Code of Maryland makes it the duty of the Boards of Supervisors of Elections of the several counties to examine the boundaries of election districts and election precincts in their respective counties from time to time, and whenever, in their judgment and discretion it shall be deemed expedient to sub-divide any said election districts or election precincts, or to sub-divide and change the boundaries of any two or more precincts in any election district into three or more precincts, then the Boards are empowered and authorized to make such sub-division. It is provided that no election district shall be sub-divided into two or more precincts that has not an excess of 600 or more voters; and that no precinct or group of precincts in any district shall be sub-divided unless one or more of such precincts so intended to be divided shall contain an excess of 600 voters.

As amended, the fourth precinct of the fourteenth district would contain nearly twice the minimum number of voters required by law before any sub-division either of the district or of the precinct is authorized, and therefore it is my opinion that the Board of Supervisors of Elections of Baltimore County may sub-divide the fourth precinct of the fourteenth district under the power vested in it by Section 127 of Article 33 of the Annotated Code.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—REGISTRATION IN ANNE ARUNDEL COUNTY—ACT 1918, CH. 82.

July 25, 1919.

W. G. Gott, Esq.,
Counsel to Board of Election,
Supervisors of Anne Arundel Co.,
Annapolis, Maryland.

DEAR MR. GOTT: I beg to reply to your favor of July 23rd, referring to the fact that portions of certain precincts of Anne Arundel County were annexed to Baltimore City under the Act

of 1918, Chap. 82, and asking my opinion whether the Board of Election Supervisors can order a registration for the portions of these precincts which still remain in the county.

There will, of course, be a registration day in Anne Arundel County on the Tuesday preceding the next primary election day, under Section 17A of the Election Laws, so that I suppose you refer to a new general registration.

Under Sec. 7 of the Act of 1918, Ch. 82, the Board may, of course, provide new polling places and rearrange existing precincts in this territory, but no power to order a new registration is given. Therefore, no such power exists.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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ELECTIONS—REGISTRATION BEFORE PRIMARY—TRANSFERS—CHANGE AFFILIATION—WHO MAY REGISTER.

August 29, 1919.

Board of Election Supervisors.

(*Sent to each County Board.*)

GENTLEMEN: On account of some misunderstandings as to the application in the counties of Sec. 17A of Art. 33 of the Annotated Code of Maryland, I beg to advise you on the following points:

1. Transfers can be made on the registration day preceding the primary. Sec. 31 of Art. 33 provides that the Certificates of Transfer shall be granted by the Board of Registry *when in session,* or by the Board of Supervisors before the session of the Board of Registry. The Board of Registry is, of course, in session on the registration day preceding the primary, and, therefore, any transfer issued on that day should be issued by the Board of Registry. If, however, the applicant already has a transfer certificate issued by the Board of Supervisors, then I see no reason why he may not present that to the Board of Registry on the registration day and be transferred.

2. Voters registered as "declined" or "independent" are entitled, under Section 186, to affiliate with any political party

on the registration day preceding the primary, and may then vote in the primary election. Section 182 provides that no person is permitted to change his affiliation within six months before the primaries, but in the case of Murphy vs. Wachter, 126 Md. 563, a person registered as "declined" or "independent" is not affiliated, and, therefore, when he does affiliate, he makes no change within the meaning of Section 182.

3. Any person not on the registration books in any part of the State, but who may be entitled to vote at the next general election in the county in which he resides is entitled to register on the registration day preceding the primary.

I am sending a copy of this letter to all the Board of Supervisors of Elections in the State.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

ELECTIONS—SOLDIERS AND SAILORS ABSENT VOTING ACT—WHO MAY VOTE UNDER IT.

March 26, 1919.

Supervisors of Election of Baltimore City,
Court House,
Baltimore, Maryland.

GENTLEMEN: You have asked my opinion regarding voters who have come of age since the 6th day of November, 1917 (being the election day of that year), and the present time, but who were absent from the City in the armed service of the United States during the general registration in 1918 or the special registration for the annex in January, 1919.

Section 182 of Article 33 of the Code provides:

> "All persons arriving at the age of twenty-one years, after the closing of the next preceding registration, or who shall attain the age of twenty-one years before the general election for which the primary election is held, entitled to be registered as qualified voters, shall be entitled to vote upon proving, under oath, to the satisfaction of a majority of the Judges of Election, their right to registration in the

precinct in which they claim the right to vote, provided they shall declare their intentions to vote for the candidate or candidates of the party at whose primary they tender their ballots."

Section 229 of Article 33 provides:

"Whenever possible, the existing election laws and the provisions of this Act shall be construed together in such a way as to promote the purpose for which this Act is intended, to the end that the citizens of the State shall not be deprived of their right or opportunity to vote because of service, as herein provided, for their State or the United States."

This last section is part of the Soldiers' and Sailors' Absent Voting Act passed by the Legislature of 1918 and is now in full force and effect because of a Proclamation issued by the Governor of Maryland.

It was clearly the intention of the Legislature that no citizen should be deprived of his vote because of his absence from the City while in the service of his Country and applying that intention to the present inquiry it is clear that those who were in the service and became of age during such service had no opportunity to present themselves to their respective Boards of Registry at the last registration.

I am, therefore, of the opinion that every soldier and sailor, who became of age since November 7, 1917, and who was in the service during the general registration of 1918, or (if he lived in the annex district) during the registration of 1919, may vote in the Primary Election to be held April 1, 1919. Of course, the Boards of Registry must be satisfied that the voter was actually in the service during the registration and did become of age after November 7, 1917, because the Act of 1918 cannot be construed to cover those cases arising prior to its enactment, and a man becoming of age prior to the election in 1917 had the opportunity to register during that year. And, of course, if a man was not actually absent from the City because of military or naval service, the Act could not possibly apply to his case.

The Boards of Registry will proceed in the cases covered by this opinion in the same manner as they now proceed in the

case of voters coming of age before an election but not actually registered.

Very truly yours,

JOHN M. REQUARDT, *Asst. Attorney General.*

ELECTIONS—VACANCIES—FILLING BY GOVERNING BODY OF PARTY.

October 15, 1919.

Mr. John Dep. Douw,
Chairman, Democratic State Central Committee,
Annapolis, Md.

MY DEAR MR. DOUW: I have your letter of October 13th in which you state that there were several offices for which there were no candidates for nomination in the Republican primary, and the Republican State Central Committee has now filed the names of certain persons as the nominees of the Republican party for these offices. You ask whether the election law authorizes this procedure.

Section 188 of Article 33 at the end provides as follows:

> "Any vacancy which may exist in respect to any office, delegates to convention, or position named in the sub-title occuring after the returns have been canvassed and finally announced *or which may exist by reason of there being no candidate for the same in any such primary election or otherwise,* shall be filled as the rules and regulations of the governing bodies for the respective parties in the counties, city or State may now or shall hereafter provide."

This section has been construed by the Court of Appeals in the following cases:

Usilton vs. Bremble, 117 Md. 10;
Graham vs. Wellington, 121 Md. 656.

I beg to advise you therefore that the parties certified by the Republican State Central Committee for these offices are entitled to have their names placed upon the ballot as the Republican nominees.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

FISCAL MATTERS.

BOND OF TREASURER AND COLLECTOR OF DORCHESTER COUNTY.

March 1, 1919.

Hon. Emerson C. Harrington,
Governor of Maryland,
Annapolis, Maryland.

DEAR GOVERNOR HARRINGTON: I beg to reply to your favor of February 27th, in which you ask whether I think the Bond given by Mr. Thomas E. Kerr as Treasurer and Collector of Dorchester County on January 1, 1918, is a proper Bond.

The Bond is given under the Act of 1914, Ch. 834, and follows exactly the requirements of Section 107 of that Act. The only possible objection I see to it is one which you point out, as follows: That at the end of the second paragraph, it is recited that Mr. Kerr was elected and qualified under Section 121E of Chapter 834 of the Acts of the General Assembly of Maryland, but the year of the Act referred to is not given. The same thing occurs also at the end of the third paragraph, where the condition is that Mr. Kerr should perform the duties required of him by Chapter 834, but again the year of that Act is not given.

My own opinion is that the validity of the Bond is not affected by these omissions. While the year of the Act is not stated, the chapter number is correctly given, and there is no Act to which the Bond could possibly refer except Chapter 834 of the Acts of 1914. This is the Act under which the Treasurer and Collector of Dorchester County is elected, and under which he performs his duties, and there is no other Act on the subject; this being so, I think that the statute is sufficiently identified.

Indeed, I do not know that there is any legal necessity for referring to the Act at all. The condition of the Bond is that Mr. Kerr will faithfully execute the duties of his office, and this guarantees compliance with those duties, no matter what statute may impose them, and whether it is specifically mentioned or not.

While, however, my opinion is that the Bond is valid, yet it is certainly always desirable, not only to refer to the statute, but to refer to it by year, as well as by Chapter, and unless some

objection occurs to you, of which I am not advised, it will be entirely reasonable for you to ask Mr. Kerr, the surety and the County Commissioners to execute a brief statement, which could be attached to the Bond, that "where Chapter 834 of the Acts of the General Assembly of Maryland is mentioned in the attached Bond, it is understood that Chapter 834 of the Acts of the General Assembly of Maryland of 1914 is intended." This would avoid the possibility of any question being raised.

I return you the copy of the Bond.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—BOND TO STATE FROM ADMINISTRATOR OF DECEASED COLLECTOR OF STATE TAXES.

July 8, 1919.

Col. Harry J. Hopkins,
Comptroller's Office,
Annapolis, Maryland.

DEAR COLONEL HOPKINS: I beg to reply to your favor of July 1st, in which you ask whether the administrator of a deceased tax collector, who is collecting and paying over to the State taxes charged against his decedent, is required to file a separate bond as a collector of State taxes, or whether his bond as administrator will cover these collections.

Bagby's Code, Art. 26, Secs. 40 to 43, authorize the administrator of a deceased collector of taxes to secure from the Circuit Court an order extending the time allowed by law to complete the collections charged against the deceased collector.

I do not find any provisions of law requiring an administrator who has obtained an order under the above section, or who is collecting taxes charged against his decedent without the necessity of such order, to give bond to the State as a collector of State taxes. I, therefore, think that no such bond is required, but that the administrator's bond will cover the collections.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—BUDGET—APPROPRIATION FOR SOUTHERN MARYLAND EMERGENCY HOSPITAL—ACT 1918, CH. 438—INDUSTRIAL SCHOOL AND HIGH SCHOOL.

January 16, 1919.

Col. Harry J. Hopkins,
State Comptroller's Office,
Annapolis, Maryland.

DEAR COL. HOPKINS: Mr. Edward J. Edelen has sent me copy of a letter from the Comptroller to you, dated November 28, 1918, relating to the $2,000 appropriation made by the Act of 1918, Ch. 438, and asks that I advise him what is necessary for the payment of that appropriation.

I am writing my view of the matter to you instead of to Mr. Edelen, because before advising him I want to know whether there is any reason why the conclusion I have reached does not meet with your approval.

The Act of 1916, Ch. 251, appropriated $10,000 for a hospital in Charles County to be known as the Southern Maryland Emergency Hospital, the same being payable when $5,000 had been raised either by private contribution or by county levy, and the whole sum of $15,000 to be used for building and equipping the hospital.

In accordance with my opinion to the Comptroller of November 9, 1917 (Attorney General's Opinions, Vol. 2, p. 202), the State's appropriation was not reverted.

When the Legislature of 1918 met, the representatives of Charles County desired to change the application of this $10,000.00 appropriation, in such manner that $2,000 of it should be applied to the establishment of a central colored industrial school in Charles County, and the remaining $8,000 for a high school for white pupils.

Accordingly, the Act of 1918, Ch. 438, provided that $2,000 of the said $10,000, instead of being applied to building the hospital, should be applied to the purpose of establishing the central colored industrial school, said sum to be paid to the County Board of Education of Charles County as soon as the Act took effect, and any additional amount which the school might cost, not exceeding $1,000, to be raised by county levy.

And the Act of 1918, Ch. 445, provided that the remaining $8,000 of the said $10,000, instead of being applied to the hospital, should be applied to the purpose of establishing a High School for white pupils, said sum to be paid to the County Board of Education as soon as the Act took effect, and any additional amount which the school might cost, not exceeding $4,000, to be raised by the sale of the Indian Head and Glymont public school lots and buildings and by local levies.

There is, I think, no doubt that both of these appropriations are now payable. Indeed, both Acts expressly provide that they shall be paid to the County Board of Education as soon as the Acts take effect, which was June 1, 1918.

The provision of the Act of 1916, Ch. 251, that $5,000 should first be raised by private contribution or county levy is, of course, no longer a condition. That $5,000 was to be raised for the hospital, and was to be added to the State's $10,000 appropriation for the same purpose. But under the Acts of 1918 the hospital is not to be built. Instead, the $10,000 is now to be applied, $2,000 to the industrial school, and $8,000 to the high school. The manner of raising any additional amounts which either may cost is specified, and the State's payments are required to be paid as soon as the Acts take effect.

I understand that the $8,000 appropriation has, in fact, already been paid. The $2,000 appropriation should be paid also.

I will be very much obliged if you will let me hear either from yourself or the Comptroller, in order that I may advise Mr. Edelen.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—BUDGET—APPROPRIATIONS TO HOSPITALS —PER CAPITA SYSTEM—NO DEDUCTION FOR HOSPITAL DAYS PAID BY BALTIMORE CITY OR THE COUNTIES.

February 26, 1919.

Hon. William J. Ogden, Secretary,
Board of State Aid and Charities,
405 *Union Trust Building,*
Baltimore, Maryland.

DEAR SIR: I beg to reply to your favor of February 3rd, in which you ask my opinion upon questions arising in the application of the per capita system of appropriations to hospitals receiving State aid.

The Budget Acts for 1919 and 1920 (Acts 1918, Ch. 206, pages 474-480 and pages 549 to 557) make appropriations to different hospitals on the basis of various amounts "per capita per hospital day," and in the case of one of them, the Franklin Square Hospital, the word "free" patients is used. You ask whether free patients are contemplated by all these appropriations. I think there is no doubt that they are. This has always been the construction in the past. The State does not contribute for patients who pay for themselves.

You also ask whether or not, in computing the free hospital days to be paid for by the State, the hospital days paid for by the City of Baltimore or by the counties of the State should be deducted. The aid extended by the counties to the county hospitals has been very small, but during the last quarter of 1918 the City of Baltimore paid the city hospitals on a per capita basis of 87½c, and since January 1, 1919, this basis has been increased to $1.00.

If hospital days for which the City of Baltimore pays are to be regarded as paid days, and are, therefore, to be deducted in calculating the free hospital days for which the State is to pay, the result will be very serious to many of the hospitals.

For example: The State's per capita for Saint Agnes Hospital is 70c. The total free hospital days of this institution for the first quarter of 1918-1919 were 5,614, and Baltimore City paid for 5,168 free hospital days. If these 5,168 days are to be deducted from the total of 5,614 days, then there will only

remain 446 days as the basis for the State's per capita payments of 70c. This would represent a contribution by the State for the quarter of $312.20, whereas one-quarter of the State's annual appropriation to Saint Agnes is $2,500.00. If, however, the 5,168 days paid for by Baltimore City are not deducted, so that the State bases its per capita of 70 cents on the total of 5,614 days, then Saint Agnes will receive the whole of this $2,500.00 for this quarter.

A like situation exists in the case of others of the hospitals in Baltimore City, and the hardship of this situation upon so many worthy institutions would be so serious, that I delayed answering your letter until I could make a thorough examination into the way the State's per capita payments were calculated. This examination has convinced me that the payments made by the City of Baltimore should not be deducted, in calculating the amounts due by the State.

The State's per capita upon the Baltimore City Hospitals (Act 1918, Ch. 206, pages 474-480 and 549 to 557) is as follows:

Franklin Square	80c
Hebrew	80c
Maryland General	80c
Mercy	70c
Saint Agnes	70c
Saint Joseph's	70c
Union Protestant Infirmary	80c
University	80c
Women of Maryland	80c

The fact that some of these hospitals receive 70 cents and others 80 cents is accounted for by differences in overhead expenses. These amounts were inserted in the Budget by the Governor, and are the amounts recommended to him by the Board of State Aid and Charities. See Supplementary Data at end of 1918-1920 Budget, Table No. 1, pages 5-6. These recommendations were based upon statistics given in Table No. 11, page 38 of the said Supplementary Data, from which it appears that the average per capita cost to the State of the Balti-

more City Hospitals, *after the payments made by the City had been deducted,* was 69¼ cents, or approximately 70 cents. It is clear, therefore, that the State's per capita of 70 and 80 cents, first recommended by your Board, then adopted by the Governor and finally enacted by the Legislature, was arrived at as the State's per capita contribution *after* allowance for Baltimore City's payments had been made.

This fact appears even more clearly when the State's per capita to the County Hospitals is considered. There are thirteen such hospitals, and after deducting comparatively small contributions made by the counties, the average per capita cost to the State of these hospitals, together with contributions made to two counties, is shown by Table No. 11 to have been $1.81¼. This is over twice the average per capita cost to the State for the Baltimore City hospitals, the difference being in large part accounted for by the payments made by Baltimore City to the city hospitals, but not made, of course, to the county hospitals.

The State's per capita for twelve of these thirteen county hospitals was fixed by the Legislature at $1.60, or practically double the State's per capita (70 and 80 cents) to the Baltimore City Hospitals, and the amount by which the State's per capita to the county hospitals exceeds the State's per capita to the Baltimore City hospitals is approximately the per capita of 62½ cents paid by Baltimore City to the city hospitals, and deducted before the State's per capita to those hospitals was fixed, plus additional overhead expenses.

In view of these facts, it is entirely clear that in providing per capita payments by the State to the Baltimore City hospitals of 70 and 80 cents, the Legislature took into consideration the payments made to these hospitals by Baltimore City, and since such payments were deducted in arriving at the State's per capita, it, of course, would not be proper to deduct them a second time.

I, therefore, beg to advise you that the per capita payments to be made by the State to the Baltimore City hospitals should, in each case, be based upon the total free hospital days, without making any deduction for the hospital days paid for by Baltimore City.

In like manner, payments made by the counties should not be deducted in computing the State's per capita payments to the county hospitals.

Of course, the total amount received on this basis by any hospital during the year cannot exceed the year's total appropriation to such hospital.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—BUDGET—APPROPRIATION BILLS NOT PROVIDING THE METHOD FOR RAISING THE MONEY.

March 29, 1919.

Clyde H. Wilson, Esq.,
Secretary, State Roads Commission,
Garrett Building, Baltimore, Md.

DEAR MR. WILSON: I beg to reply to your favor of March 21st, in which you ask whether the State Treasury can be required to pay the $50,000 appropriation made by the Act of 1918, Ch. 389.

This appropriation was made for the building of a road in Frederick County, from Brunswick to Knoxville, as soon as the State Roads Commission found the same practicable, and for this work the Act appropriated $50,000 "out of any money in the State Treasury not otherwise appropriated."

At the time this Act was passed the Budget Amendment to the Constitution had been adopted, by which the General Assembly was prohibited from appropriating any money out of the Treasury, except under the Budget Bill. It follows, of course, that the appropriation made by the Act of 1918, Ch. 389 ,not being in the Budget Bill, cannot be paid, although the State Roads Commission has, of course, the power to build the road out of its general funds.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—BUDGET—HEALTH DEPARTMENT—APPROPRIATIONS AND REVENUE FROM OUTSIDE SOURCES —REVERSION.

February 11, 1919.

Walter N. Kirkman, Esq.,
Chief Clerk, Department of Health,
15 W. Saratoga St., Baltimore, Md.

DEAR MR. KIRKMAN: I am replying to your favor of January 24 to Mr. Whyte, because the question you ask involves a principle that may apply to a number of the State Departments.

I understand that every year the Department of Health receives income from several sources outside of the State appropriations. These sources are: The administration of the Pasteur treatment, the sale of tuberculosis prophylactic supplies, engineering services in connection with the installation of sewerage and water supply systems at certain State institutions and the occasional sale of certain property, such as used office furniture, motor cars, tires, etc. The income derived from these sources ranges from three to five thousand dollars a year, and I am assuming that your department is authorized to make these sales and charges.

You say that, in the past, you have forwarded these moneys to the State Comptroller, who has placed them to the credit of the proper State appropriation. By this I understand that when, for example, you have sold prophylactic supplies, the money received has been credited to the appropriation from which these supplies were purchased. You ask whether this procedure can be continued under the Budget system.

In my opinion it can.

Take, for example, the case of prophylactic supplies. The Act of 1918, Ch. 206, page 438, appropriates the sum of $6,000 for this purpose for 1919. When part of the supplies purchased with this money are sold, the receipts must either go into the general treasury or be credited to the appropriation. Crediting such receipts to the appropriation does not result in increasing the appropriation, but is simply a "turn over" of your stock, enabling you to use the appropriation to the broad-

est possible extent for the purpose for which it is intended. The same is true with respect to the other cases you mention.

When, therefore, moneys of this kind are received, you should remit the same to the Comptroller, who will credit them to the proper appropriation.

Section 2 of the Act of 1918, Ch. 206, however, provides that any unexpended balance of an appropriation, against which there are no outstanding obligations, shall revert to the Treasury at the close of the fiscal year. Therefore, at the close of each fiscal year, the appropriations, including the amounts credited thereto, as above, will revert, except to the extent that there may be outstanding obligations against them.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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FISCAL MATTERS—BUDGET—STATE DEPARTMENT OF EDUCATION—DISTRIBUTION OF SCHOOL FUNDS—VOUCHERS.

July 10, 1919.

Hon. Hugh A. McMullen,
State Comptroller,
Annapolis, Maryland.

MY DEAR MR. MCMULLEN: I have your letter of June 26th, and its accompanying statement, relative to the time of payment of the appropriations under Chapter 206 of the Acts of 1918 to the State Department of Education and to the several State Normal Schools.

I have taken this matter up with the Assistant Superintendent of Schools, Mr. Reavis, and am sending him a copy of this opinion.

The Budget for 1918-19 is contained in Ch. 206 of the Acts of 1918. Appropriations are made to the State Department of Education and to the several Normal Schools, all to be paid out of special funds. These appropriations are scheduled just as are all similar appropriations in the Budget. The special funds out of which they are paid are those provided for by Ch. 210 of the Acts of 1918, levying State taxes. A tax of 15c. on each

$100.00 being levied thereby for the support of the public schools, and a tax of 2c. to aid in support of the public schools and for governmental requirements. The method of distributing the money thereby raised is provided by Art. 77, Secs. 88, 133, 136, 137, 138 and 139. The three which apply to the Normal Schools and to the expenses of the State Department of Educations are Secs. 88, 133 and 136.

Section 133 provides that the money appropriated from the public school tax shall constitute the general school fund, and directs the Comptroller to charge against it the appropriations made for the State Department of Education, and the appropriation for the maintenance and support of the State Normal Schools.

Section 88 provides that the sums appropriated for the maintenance and support of the State Normal Schools shall, unless otherwise specified and provided, be paid in equal instalments on the first days of January, March, June and October.

Section 136 provides that the appropriations for the State Board of Education and for the support and expenses of the office of the State Superintendent of Schools shall be paid each year in equal instalments on the first days of January, March, June and October to the Treasurer of the State Board of Education.

The appropriations for the expenses of the State Board of Education (including the State Superintendent of Schools and for the Normal Schools), are, therefore, not payable in advance, but are payable in four instalments, beginning on January 1st, and the last payment out of the 1918 tax levy is to be made on October 1, 1919. The payment which you are directed to make on the first day of June is, therefore, not in advance, but is for the third quarter.

I do not think the Legislature could be said to have intended, by any necessary implication in the Budget Bill, to repeal the dates for these payments fixed by Art. 77. There is nothing in Ch. 206 of the Acts of 1918 which prevents these payments from being made on the dates directed by the above quoted sections. The two Acts can be construed together, and I think should be. In other words, you can require from the Treasurer of the State Board of Education his certificate that the quar-

terly apportionment of the sums appropriated by Ch. 206 for the several State Normal Schools and for the expenses of the State Department of Education are due and payable by him for the several purposes set out in the schedules, and upon receiving such certificate you will be relieved of responsibility in making the payment.

It is, therefore, my opinion that upon receipt by you of a requisition from the Treasurer of the State Department of Education for the quarterly payments due on the first days of January, March, June and October, in which requisition the Treasurer shows that these payments are to be made in accordance with the schedules of the Budget, and sends you his receipt therefor in accordance with the Budget, you should pay him the one-fourth of the appropriation asked for. His requisition must, of course, show that it is to be used in accordance with the schedule contained in the Budget, or any amended schedule adopted under the authority of the Budget Bill, with the approval of the Governor.

You will recall that in my opinion to your office of March 17, 1919, upon the question of requiring vouchers before paying appropriations, I stated that there were some cases in which this should not be required, one of them being the case of the State Board of Agriculture. The present is, I think, another instance of the same kind.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—BUDGET—PAYMENT FOR CONDEMNED CATTLE.

August 19, 1919.

Dr. A. F. Woods,
Md. State Board of Agriculture,
Fidelity Building,
Baltimore, Md.

DEAR DR. WOODS: I beg to reply to your favor of August 14th in which you ask whether a special legislative appropriation is necessary for the payment of awards made for condemned cattle under the Act of 1916, Ch. 337, Sec. 15, or

whether the same can be paid out of money in the State Treasury, not otherwise appropriated.

The law in question provides that the appraised value of condemned cattle shall be paid by the State, and an appropriation appears to have been made for this purpose by the appropriation acts for 1917 and 1918 (Act of 1916, Ch. 685, p. 1574, and Ch. 684, p. 1550). After these Acts were passed in 1916, the Budget Amendment to the Constitution was adopted, and by the terms of this Amendment, no money can be paid out of the State Treasury unless appropriated, and then only for the purpose for which it is appropriated in the Budget Bill. The result is, that the State Treasurer has now no power to pay these awards unless an appropriation is made for this purpose in the Budget Bill. The obligation upon the State to pay them still continues, but in the absence of a legislative appropriation, there is no money available for carrying out this obligation.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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FISCAL MATTERS—BUDGET—REQUIREMENT OF VOUCHERS.

March 17, 1919.

Col. Harry J. Hopkins,
State Comptroller's Office,
Annapolis, Maryland.

DEAR COLONEL HOPKINS: I beg to reply to your favor of March 14th, in which you ask whether the institutions, boards and commissions of the State should file vouchers with their monthly requisitions, or whether they can draw each month for one-twelfth of their annual appropriation.

The Budget Act (Act 1918, Ch. 206), appropriates the amounts therein named, "or so much thereof as shall be sufficient to accomplish the purposes designated by the respective appropriations." Since only so much of an appropriation can be used as is sufficient for the purpose designated, it follows that, as a general rule, the Comptroller should require vouchers, because in this way he can feel assured that the expenditures were really necessary.

I say "as a general rule," because in an opinion given the Comptroller on July 17, 1917 (Attorney General's Opinions, Vol. 2, pp. 196-198), I discussed some phases of the question at length, and reached the conclusion that in the case of the State Board of Agriculture there was no *legal* reason why the whole appropriation should not be paid at one time, if the Comptroller, as a matter of administrative policy, deemed this advisable, although in such event the Board would have to account, at the end of the year, for the disbursements made by it, as well as for any unexpended balance.

As I do not know what particular appropriations you have in mind, I cannot very well answer your question more definitely than to say that in the case of some appropriations you may be prohibited from paying out any part of them, except upon the presentation in advance of vouchers, and in other cases, where you are not so prohibited, the question is ordinarily one of administrative policy for you to decide, bearing in mind, however, that if you pay any part of the appropriation without requiring vouchers in advance, then the board must account for its expenditures after it has made them, and should at that time be required to file its vouchers.

In other words, in cases where the Comptroller, as a matter of administrative policy, has the power to and does permit a board to receive its appropriation, or some part of it, without filing vouchers in advance, the board must nevertheless file the vouchers afterwards.

I may add that, save in exceptional cases, it is certainly the better and safer practice to require vouchers in advance.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—BUDGET—STATE BOARD OF PRISON CONTROL—HOUSE OF CORRECTION APPROPRIATION —REVERSION.

April 14, 1919.

Mr. Robert D. Case, Secretary,
State Board of Prison Control,
701 *Union Trust Bldg., Baltimore, Md.*

DEAR MR. CASE: I beg to reply to your favor of April 8th, in which you ask whether the State Board of Prison Control can use the balance remaining in its hands, at the close of the fiscal year ending September 30, 1918, to the credit of the Maryland House of Correction, in part payment of the deficit of the Maryland Penitentiary for the same fiscal year.

This balance represents the amount by which the revenues of the House of Correction, consisting of the appropriations made to it by the Act of 1916, Ch. 684, page 1553, and of its other income, exceeded the expenses of the institution for said fiscal year. The deficit of the Maryland Penitentiary is being carried, at interest, by one of the Baltimore banks.

The board's right to use the balance as desired depends, first, upon whether the balance reverted to the general treasury on September 30, 1918, under the decision in McMullen vs. State Roads Commission, 130 Md. 541, and, secondly, if it did not, then whether the balance can be used to meet a deficit in the Penitentiary, under the provisions of Secs. 626, 627, 628, 629, 631, 651, 652, 656 and 657 of the Act of 1916, Ch. 556, placing both the Penitentiary and the House of Correction in the hands of your board.

While these two questions, particularly the first one, are not entirely free from doubt, yet under the circumstances of this case I think that the board may properly use the balance in question in part payment of the Penitentiary deficit.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—CLERK OF THE CIRCUIT COURT OF BALTIMORE CITY—EXPENSES OF HIS OFFICE.

February 25, 1919.

William A. Gillespie, Esq.,
State Auditor,
Union Trust Bldg., City.

DEAR SIR: I am returning herewith the letter sent you by Mr. Charles R. Whiteford, clerk of the Circuit Court, in which he asks whether or not he is authorized to buy linoleum for the floor of his office out of the fees now in his hands. I have notified Mr. Whiteford that under the circumstances he is authorized to make this expenditure.

The City of Baltimore furnishes him office space and heat and light, free of charge, and I understand that the clerk assumes all other expenditures. The clerk is empowered to pay the necessary expenses of his office by virtue of the provisions of the State Constitution and of Art. 17 of the Annotated Code; see Opinions of the Attorney General, Vol. 2, page 16. In the present instance Mr. Whiteford, so I am informed, has a balance after all other expenses and salaries are paid, sufficient to pay for the linoleum.

Very truly yours,

PHILIP B. PERLMAN, *Asst. Attorney General.*

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FISCAL MATTERS—COLLATERAL—DEPOSIT REQUIRED OF NATIONAL BANKS ACTING IN FIDUCIARY CAPACITY UNDER FEDERAL RESERVE ACT.

October 13, 1919.

L. Lane, Esq.,
Assistant Chief Clerk,
State Treasurer's Office, Annapolis, Md.

DEAR MR. LANE: In further answer to your recent inquiry whether the Salisbury National Bank, which desires to act in a fiduciary capacity under the Federal Reserve Act, can give a surety bond instead of putting up a collateral deposit, I beg to advise you that the Federal Reserve Act as amended Sep-

tember 26, 1918, provides that where the Federal Reserve Board has granted authority to national banks to act in a fiduciary capacity, such banks shall make deposits with the State authorities just as State corporations make deposits under similar circumstances.

Art. 23, Sec. 110 of the Annotated Code, Vol. 3, page 201, provides for deposits made for such corporations. There is nothing in this article which authorizes you to receive a surety bond instead of collateral and I know of no other law authorizing the giving of such bonds. Under these circumstances it is my opinion that the Salisbury National Bank must deposit collateral in the same manner and to the same extent as a State bank or trust company desiring to act in a fiduciary capacity.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

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FISCAL MATTERS—COMPUTATION OF STATE TAX ON SECURITIES, ACT 1914, CH. 411—15 CENT RATE.

January 20, 1919.

Hon. Hugh A. McMullen,
State Comptroller,
Annapolis, Maryland.

DEAR MR. MCMULLEN: I beg to reply to your favor of January 16th, in which you say that on June 18, 1918, the Appeal Tax Court of Baltimore certified to you the holders of Baltimore City stock, Western Maryland loan of 1927, computing the State tax on such stock at the full rate of 36¾ cents on the market value, and that on January 14, 1919, the Appeal Tax Court sent you a corrected certificate, in which they have computed the State tax on said loan at 15c on the market value. You ask which certificate is correct.

This certificate is made to your office under Bagby's Code, Art. 81, Secs. 108, etc., which provide for the payment of the State tax on Baltimore City stock.

Before 1914, the law (Bagby's Code, Vol. 2, Art. 81, Sec. 214) provided that all bonds, certificates of indebtedness or

evidences of debt issued by any public or private corporation, not exempt from taxation, and owned by residents of Maryland, and paying interest, should be assessed at their market value, and the regular State tax should be paid thereon. The Act of 1914, Ch. 411, amended this section by providing that the State tax in such cases should in no event be more than 15 cents, the assessment still to be made at the market value.

Baltimore City is a public corporation within the meaning of this section, and the certificate should compute the State tax at the rate of 15 cents on the market value of the Western Maryland loan. This is what the certificate of January 14, 1919, does, and it is correct. The earlier certificate, in computing the State tax at the full rate, was erroneous, the error, I find, being due to the inadvertent use of an old form, which was not changed when the law was changed.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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FISCAL MATTERS—LIABILITY OF GUARANTEE COMPANY'S DEPOSIT WITH STATE TREASURER TO CLAIM OF CREDITOR OF COMPANY.

January 20, 1919.

Frank G. Drenning, Esq.,
623 *Kansas Avenue,*
Topeka, Kansas.

DEAR SIR: Your favor of January 15th to the State Treasurer has been referred to me. You enclose copy of execution from the District Court of your State in favor of the City of Topeka against the Fidelity and Deposit Company of Maryland for $14,157.57 and costs, which execution was issued upon a judgment obtained against the company on one of its surety bonds, and affirmed by your Supreme Court in 102 Kan. 384. You say that the Fidelity and Deposit Company is delaying payment of the judgment, and you ask what procedure is necessary in order to subject the company's deposit with the State Treasurer to its payment.

The deposit in question was made by the Fidelity and Deposit Company, pursuant to the Act of 1892, Ch. 109, Sec. 85E, amended by the Act of 1896, Ch. 160, Sec. 85E, codified in Code P. G. L. 1904, Art. 23, Sec. 98, and in Bagby's Code of 1911, Vol. 1, Art. 23, Sec. 110, amended again by the Act of 1912, Ch. 194, Sec. 98, and now codified in Bagby's Code of 1914, Vol. 3, Art. 23, Sec. 110. This will enable you to trace the legislation, if you have not already been able to find the references.

The deposit is a *trust fund* for the benefit of *"all* the holders of policies or guarantees of said corporation," and in the case of Vandiver, State Treasurer, vs. Poe, et al., Receivers, 119 Md. 348, 87 Atl. Rep. 410, the Maryland Court of Appeals, on January 14, 1913, decided that the deposit could not be availed of by the creditors of a surety company which, although in the hands of receivers under voluntary dissolution proceedings, was yet not insolvent.

It is, therefore, clear that the deposit of the Fidelity and Deposit Company cannot be subjected to the payment of your claim.

I return the copy of the execution.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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FISCAL MATTERS—LIABILITY OF STATE FOR CITY TAXES ON STATE ARMORY.

July 8, 1919.

Hon. Hugh A. McMullen,
State Comptroller,
Cumberland, Maryland.

DEAR MR. MCMULLEN: I beg to reply to your favor of June 28th, in which you enclosed a letter from Adjutant General Warfield to yourself, and also bill from the Mayor and City Council of Cumberland against the State for $107.00, taxes levied by the City of Cumberland on the State armory at Cumberland. You ask whether the State is liable for these taxes.

The State is not liable, because property owned by the State cannot be taxed by a municipality, unless the municipality's right to tax is conferred upon it by express legislation.

County Comm. vs. Md. Hospital, 62 Md. 127, 129.

There is no legislation authorizing the City of Cumberland to tax this Armory, and, therefore, the Armory is not subject to taxation.

I return you General Warfield's letter and the tax bill.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—LOST COUPONS ON STATE BONDS.

March 22, 1919.

Hon. William P. Jackson,
State Treasurer,
Annapolis, Maryland.

DEAR MR. JACKSON: I beg to reply to your favor of March 19th.

The procedure to be followed when coupons on State bonds are lost is set out in Sec. 16 of Art. 95 of Bagby's Code. The Treasurer may issue duplicate coupons to the owner of the bonds, provided he proves, to the satisfaction of the Treasurer, that the coupons are lost, and gives satisfactory security to indemnify the State.

I return you the letter from the First National Bank.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—ROAD LOAN OF 1918—VALIDITY.

February 15, 1919.

Hon. Hugh A. McMullen,
State Comptroller,
Annapolis, Maryland.

DEAR SIR: With reference to the State of Maryland Certificates of Indebtedness, thus described—

> $1,500,000 part of "Road Loan of 1918," dated February 15, 1919, 4½% Certificates of Indebtedness, $1,000 denomination, maturing serially from February 15, 1922, to February 15, 1934—

which were awarded to the successful bidders at public sale on February 11, 1919, I beg to advise you as follows:

1—The said Certificates of Indebtedness are authorized by the Act of the General Assembly of Maryland of 1918, Chapter 295.

2—The said Act of Assembly is valid and constitutional.

3—All of the formalities prescribed by law for the issue of said Certificates of Indebtedness have been legally and duly complied with.

4—The said Certificates of Indebtedness have been duly delivered to the purchasers referred to, and the purchase price fully paid.

5—The said Certificates of Indebtedness, as issued, are in form in accordance with said Act of Assembly, are duly signed by the proper officers, and are the legal, valid and binding obligation of the State of Maryland.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

October 29, 1919.

Hon. Emerson C. Harrington,
Governor of Maryland,
Union Trust Building,
Baltimore, Md.

My dear Governor Harrington: I have before me your letter of October 27th in which you state that the State Lime Board has filed a report with you recommending that the State close the lime plant in Southern Maryland and sell the property, as the object and purpose for which the plant started has been fulfilled. You ask whether or not there is any authority to dispose of the plant.

In my opinion there is none.

The Lime Plant was established under the provisions of Ch. 221 of the Acts of 1916. That Act contemplated a continuous manufacture of lime and an annual report to the State Treasurer. There is no power in any State official or Board to dispose of any property acquired under the authority of the Legislature, unless specific authority is given by the Legislature. Chapter 221 does not indicate in any way that the Legislature intended the plant to be disposed of, or that it did not intend the lime plant to be a permanent part of the State government. On the contrary, the wording of it showed its intention to be that the lime plant should be in continuous operation from year to year.

In order to dispose of the plant, it will be necessary to have a special Act of the Legislature passed.

Yours very truly,

Ogle Marbury, *Asst. Attorney General.*

FISCAL MATTERS — STATE DEPOSITORIES — DISTINCTION BETWEEN SUBSTITUTION OF PUBLIC SECURITIES AND GIVING OF NEW SURETY BOND.

March 13, 1919.

Hon. William P. Jackson,
State Treasurer,
Annapolis, Maryland.

DEAR MR. JACKSON: I beg to reply to your favor of March 8th.

You say that the Equitable Trust Company is at present bonded, as one of the State depositories, with the Fidelity and Deposit Company to the amount of $400,000, and that it wishes to withdraw and release this bond and substitute therefor two bonds, of $100,000 and $300,000, respectively, with the Maryland Casualty Company; and you ask whether this substitution can be made without a withdrawal of all the State's money on deposit with the Equitable Trust Company.

On May 17, 1918, I wrote you, with reference to the Citizens National Bank of Frederick, that where the surety bond of a State depository was to be released and *public securities* substituted therefor, such substitution could, in my opinion, be made without a withdrawal and re-deposit of the State's money; and on June 8, 1918, I wrote you, with reference to the Union Trust Company, that where the surety bond was to be released and a *new surety bond* substituted therefor, then I thought that the State's money should be withdrawn before the release of the old bond, and redeposited under the new bond.

When *public securities* are substituted for the surety bond, a withdrawal and redeposit are not necessary, because the Act of 1916, Ch. 115 (Bagby's Code, Vol. 4, Art. 90, Sec. 8A), expressly provides that such public securities, together with the bank's own bond, shall be *in substitution* for the surety bond, and since the surety bond was liable for any loss of the State's money which may have occured while it was in effect, it follows that the public securities which, under the law, are accepted *in substitution* for such surety bonds, are likewise liable for any such loss, because otherwise the public securities would not *be a substitute* for the surety bond. Therefore, in such case, the

public securities are answerable for any loss which occurred before as well as after their substitution.

But when the surety bond is released and a *new surety bond* substituted therefor, then such new surety bond will not be answerable for any loss of the State's money which may have occurred previous to its execution, while the old surety bond was in effect; and, therefore, before releasing the old surety bond, the State must be assured that there has been no such loss. If the State draws on the bank for its proper balance, and the same is honored, this shows that there has been no loss of the State's money, so that the old surety bond can then be safely released, and the money redeposited, under the new surety bond.

These are the reasons why there should be a withdrawal and redeposit of the State's money when a new surety bond is substituted for an old one, and why a withdrawal and redeposit are not necessary when public securities are substituted.

The present case involves the release of one surety bond, with the Fidelity and Deposit Company, and the substitution therefor of two new surety bonds, with the Maryland Casualty Company. Therefore, the release and substitution should not be made without a withdrawal and redeposit of all of the State's money in the Equitable Trust Company covered by these bonds.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FISCAL MATTERS—WAR LOAN OF 1917—COMPLETION OF SPRING GROVE HOSPITAL.

March 20, 1919.

Lynn R. Meekins, Esq., Secretary,
Maryland Council of Defense,
303 Union Trust Building,
Washington, D. C.

DEAR MR. MEEKINS: I beg to reply to your favor of March 19th, in which you ask whether the Executive Committee of the Maryland Council of Defense has authority to expend $20,000 from the proceeds in its hands of the War Loan of 1917, in completing the unfinished hospital at Spring Grove, this being

the only way in which Maryland can meet the demand made upon her by the Federal Government, and indeed her own necessity, to care for returned insane soliders.

I do not know that I can add anything to my opinion upon a similar question of November 26th, 1917.

The Committee has this power, if, in its discretion, it determines that the work in question "can fairly be said to be desirable or appropriate" for "the defense of the State, the safety of its people and the protection of property and to aid the State and the United States in the present war." Act 1917, Ch. 3, Secs. 6m, 6n and 7.

I have no doubt that the work is of this character, but the Committee is the judge of this.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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FISCAL MATTERS—WAR LOAN OF 1917—EXPENSES OF RECEPTION OF MARYLAND TROOPS.

May 19, 1919.

Mr. Lynn R. Meekins, Secretary,
Maryland Counsel of Defense,
703 *Union Trust Bldg., Baltimore, Md.*

DEAR MR. MEEKINS: I have your favor of May 17th.

It is my opinion that expenses incident to the reception of Maryland troops on their return from the war are within the purposes for which the proceeds of the War Loan of 1917 may be expended, and your Committee is the judge of the character of expenditures which may be made in this connection.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FORESTRY.

FOREST WARDENS—FIRES IN BALTIMORE CITY.

May 5, 1919.

Mr. F. W. Besley, State Forester,
532 N. Howard Street,
Baltimore, Maryland.

DEAR MR. BESLEY: I beg to reply to your recent letter in which you ask whether those sections of Art. 39A of Bagby's Code which provide for the extinguishment of fires by the Forest Wardens, one-half of the expense to be paid by the county, apply to the portion of Baltimore City recently annexed, and whether Baltimore City can be required to pay one-half of the above expense for fires occurring within such annexed district.

It seems to me quite clear from Secs. 5 and 7 of Art. 39A that this law only applies to fires occurring in the counties, and not to fires occurring within the limits of Baltimore City.

I think, therefore, that Baltimore City could not be required to pay one-half of the expense incurred by the Forest Wardens in extinguishing fires within any part of the city limits, including the part recently annexed.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FORESTRY—RIGHT OF ABUTTING OWNERS ON PUBLIC ROADS TO CUT TREES.

February 27, 1919.

F. W. Besley, Esq.,
State Forester,
McCoy Hall, Baltimore, Md.

DEAR MR. BESLEY: In response to your favor of February 24th, I have considered the inquiry submitted by Mr. Bowie F. Waters, counsel of the County Commissioners of Montgomery County.

Mr. Waters states that one of the unimproved public roads in Montgomery County, which has never been surfaced, was formerly entirely the property of one of the now abutting landowners, the opposite abutting landowner owning simply to what is now the road's edge; and that the abutting owner who formerly owned what is now the road-bed claims the right to cut down all roadside trees standing within the road-bed, and has applied to the County Commissioners to stop the opposite abutting owner, who never owned any part of the road-bed, from cutting down such of these trees as are on his side of the road. Mr. Bowie asks what are the rights of the respective abutting owners to cut down these trees.

Sec. 15H of Art. 39A of Bagby's Code, as amended by the Act of 1916, Ch. 548, provides that roadside trees standing within the right of way of unimproved public roads of this kind "may be cut down and removed by the abutting land owner for his own use without first obtaining a permit" from the State Board of Forestry.

The question is, who is "the abutting land owner" within the meaning of this section? Strictly speaking, both are abutting land owners, and yet the object of the statute may have been to give the former owner of the road-bed, who is now the owner of the underlying easement, the right to the roadside trees which are on what was his property.

But one or the other of these two owners is entitled to cut down the trees, without a permit from your board, and no permit being necessary, your board is not interested in the question which one of these two owners is entitled to the trees. So far as your board is concerned, that is purely a private controversy between them. Nothing that you might say, and no opinion that I might give, would be in any way binding on either.

Under these circumstances I have concluded that this is not a case in which I should express an official opinion, and I have so notified Mr. Waters.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

FORESTRY—SHADE TREES ON PUBLIC HIGHWAYS IN HAGERSTOWN.

September 17, 1919.

Mr. Simms Jamieson,
The Chamber of Commerce,
Hagerstown, Maryland.

DEAR MR. JAMIESON: I have your letter of August 30th, in which you ask whether the Mayor and City Council of Hagerstown have the right to pass local ordinances to regulate the planting and care of shade trees along the public highways.

The State Board of Forestry has general authority over this subject. A reference to Art. 39A, Sec. 15A, *et seq.*, will show you the extent of this authority.

Under these sections any action by the Mayor and City Council would have to be taken under the authority of the State Forester.

It may be that the Charter of Hagerstown contains some provision passed since 1914 (in which year these sections were enacted, by Ch. 824 of the Acts of that year) which gives the Mayor and City Council the right to act on this subject without consulting the State Forester. This is a local matter, however, which can only be determined by an examination of your Charter, and I regret to say that the other public matters with which this office is occupied will not permit us to make such an examination for you. It is, of course, entirely outside of our official duty, but I would be glad to make it were I less occupied.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

HEALTH.

COLD STORAGE PLANTS—SMOKED AND CURED MEATS AND FISH.

September 4, 1919.

Dr. Frederick C. Blanck,
State Food and Drug Commissioner,
State Board of Health,
15 W. Saratoga St., Baltimore, Md.

DEAR DR. BLANCK: I received your letter of August 28th, calling to my attention my letter to you of August 18th, in which it is stated the cold storage plants using refrigeration for the purpose of curing their meats will have to be licensed.

I understand now, from your letter, that the business of curing meats has to do with pork products such as ham, shoulders and bacon, that they are placed in storage at a lower temperature than 45 degrees where they are kept salted for a longer period than 30 days, after which they are smoked and can then be kept for an indefinite period, either in or out of cold storage.

Sec. 177-I of the Act declares that cold storage shall mean the storing or keeping of articles of food at or below a temperature above zero or 45 degrees in a cold storage warehouse for more than 30 days. Articles of food shall mean *fresh meat and fresh meat products,* and all fish, game, poultry, eggs and butter. As I now understand it, pork products, while certainly *fresh meat,* are salted for the purpose of keeping them prior to being smoked, when they then ceased to be fresh meat. It is evident to me that the statute only has reference to meat products and fish which are kept from spoiling by reason of a low temperature. Fresh pork would certainly come under this law, but I agree with you that smoked and cured meats are not within the meaning of the law. The section also refers to *all fish,* but this cannot mean smoked fish or salted fish, which are so cured as not really to require cold storage to prevent them from spoiling.

Very truly yours,

WM. PINKNEY WHYTE, JR.,

Asst. Attorney General.

HEALTH—STATE BOARD JURISDICTION REFUSE DISPOSAL—HOG FARM.

January 23, 1919.

State Board of Health,
16 *W. Saratoga Street,*
Baltimore, Maryland.

DR. JOHN S. FULTON, *Secretary.*

DEAR SIR: In answer to the request of the State Board of Health as to whether or not a "contractor who proposes to feed city garbage on a farm to hogs is required, under the law, to submit plans of his piggery and ask for a permit before proceeding with such refuse disposal," I beg to advise as follows:

That by Chapter 810 of the Acts of 1914, the same being

> "An Act for the better preservation of the public health by preserving the purity of the waters of the State; providing for the supervision and control by the State Board of Health over water and ice supplies, sewerage, trades wastes and refuse disposal; and for the maintenance, alteration, extension, construction and operation of systems and works relating thereto;"

And by Section 2 of that Act it is provided:

> "That the State Board of Health shall have general supervision and control over the waters of the State, in so far as their sanitary and physical condition affect the public health or comfort * * *. It shall examine all existing public water supplies, sewerage systems and *refuse disposal plants,* and shall have power to compel their operation in a manner which shall protect the public health and comfort, or to order their alteration, extension or replacement by other *structures* when deemed necessary. After the passage of this Act it shall pass upon the design and construction of all public water supplies, sewerage systems and refuse disposal plants which shall be built within the State."

Section 4 requires:

"That every county, water, sewerage or sanitary district authority, municipality, corporation, company, institution and individual supplying or authorized to supply, at the

time of the passage of this Act, water, sewerage or refuse disposal service to the public, or owning water or sewerage systems, or refuse disposal plants, serving or authorized to serve the public, within the State, shall, within six months after the passage of this Act, file with the State Board of Health a certified copy of the plans of its water supply or sewerage system, or refuse disposal plant, complete; * * *"

Section 8 of the Act provides that no one shall

"install a system of water supply, sewerage or refuse disposal, for public use, nor materially alter or extend any such existing system, without having received a written permit from the State Board of Health so to do; nor shall any permit for this purpose be issued until complete *plans and specifications* for the *installation, alteration or extension,* together with such information as the State Board of Health may require, have been submitted and approved by the Board. * * * In case it shall become necessary or desirable to make material changes in plans or specifications, such changed plans or specifications, together with a statement of the reasons for the alterations, shall be submitted to the State Board of Health, and no material changes shall be embodied in the actual construction until they are approved by the Board and a permit issued therefor."

From the above it would seem that the refuse disposal plant contemplated by the statute must mean some kind of a structure or establishment where garbage and other refuse is to be destroyed, or partially so, in a scientific manner and in a structure, plant or establishment especially designed for that purpose. It is my opinion that the feeding of refuse to hogs on a farm is not within the meaning of the Act. The refuse disposal plants spoken of in the Act contemplate both a public and a private plant, and it cannot be that the Legislature intended, by the use of such words, to cover practically every farmer in the State, because if the words "refuse disposal" can be made to cover the feeding of a large number of swine equally so they must cover a small number.

The State Board of Health will have jurisdiction over any nuisance detrimental to health, and it can prevent the pollution

of the waters of the State or their threatened pollution if, in its judgment, this contemplated piggery produces, or is likely to produce such effect. The keeping of hogs in large numbers on a farm is certainly not, in itself, a nuisance and whether it will become a nuisance will entirely depend upon its operation and effect. If, however, it is proposed to keep a great quantity of hogs on a comparatively small acreage, and, in the opinion of the State Board of Health, the drainage from such acreage will be of such a character as to be detrimental to health, then such threatened invasion of the rights of the State can certainly be prevented by injunction.

Yours very truly,

WM. PINKNEY WHYTE, JR., *Asst. Attorney General.*

LICENSES.

BUYING AND SELLING PRODUCE—GENERAL AND LOCAL LAWS.

September 17, 1919.

Mr. W. M. Pannell,
The White House,
Washington, D. C.

DEAR SIR: I have your letter of August 28th in which you ask for a copy of the law of Maryland in reference to the buying and selling of produce and its transportation to and from the District of Columbia.

The general law on the subject is contained in Art. 56, Secs. 24, *et seq.*, of the Annotated Code under the provisions of which a State license is required.

This general law does not apply to Prince George's County, which is one of the counties adjacent to the District of Columbia. This county has a local law of its own imposing a higher license than the general law. This local law can be found in Duckett's Prince George's County Code, Secs. 438 and 439, enacted by the Act of 1892, Ch. 410, and the Act of 1904, Ch. 297.

An examination of these statutes will give you the information you desire.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

LICENSES—CALCULATING MACHINES—ADDING MACHINES.

July 11, 1919.

Charles C. Wallace, Esq.,
Secretary, State Tax Commission,
Union Trust Bldg., Baltimore, Md.

DEAR MR. WALLACE: I beg to reply to your favor of July 7th in which you ask whether the Marchant Calculating Machine Company is required to take out a license under the Act of 1916, Ch. 704, Sec. 167, which imposes a license on places of business "displaying cash registers and adding machines."

This company's representative called to see me. He contends that his company is not required to take out this license on the ground that its machines are not adding machines. They are, he contends, calculating machines, their principle functions being to subtract, multiply and calculate percentages. He says that they do add also, but that this is not their real purpose, and that a person who wanted an adding machine would not buy the machine put out by this company.

The question is, of course, one of fact, depending upon whether this company's machine is really an adding machine or not. I think that your commission may well exercise its own good judgment in deciding this question. My own feeling would be that a machine which does add does not cease to be an adding machine within the meaning of the law, merely because it also makes other calculations, so that I am inclined to the view that this company is required to take out an adding machine license.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—COLLECTION AGENCIES.

July 7, 1919.

Frank B. Smith, Esq.,
110 *E. Lexington Street,*
Baltimore, Maryland.

DEAR MR. SMITH: I am in receipt of your favor of June 28th. On June 21st, 1916, I advised the Sun Mercantile Agency of Frostburg, Maryland, that in my opinion the Act of 1916, Ch. 704, Sec. 169, does not cover a concern conducting a collecting agency only. I presume that this covers your inquiry.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—DOG LAW—COMPENSATION TO COUNTY TREASURER —REPEAL OF LOCAL LAWS.

January 25, 1919.

A. Howard Earp, Esq.,
President, Board of County Commissioners,
Ellicott City, Howard County, Maryland.

MY DEAR MR. EARP: You have asked for my opinion on the question whether you are authorized to pay to the Treasurer of Howard County 25% of the dog license fees collected by him as compensation for the collection.

The State-wide Dog Law was re-enacted by Ch. 497 of the Acts of 1918. It repealed all public general laws and all public local laws inconsistent with its provisions. One of the provisions is that a license fee provided under it shall be the only license or tax required for the ownership or keeping of a dog. It, therefore, follows that all local laws taxing dogs, such as you have previously had in Howard County, were repealed on June 1, 1918. I am informed by you that, under your local dog law thus repealed, a reference to which I have not been given, you had authority to pay the County Treasurer compensation for his collections out of the dog fund. Such authority, of course, passed with the tax itself, and your authority to pay the Treasurer anything out of the present dog fund for collecting, under Ch. 497 of the Acts of 1918, must be derived, if you have it at all, from that Act alone.

I understand that the facts which caused your inquiry are, that your board sometime in the past year did give your County Treasurer a warrant on himself, to be charged to the dog fund for approximately $400, which was twenty-five cents on each dollar of the license fund collected. At the time you issued this warrant you thought it was authorized, but some question has now arisen as to your authority, and you wish to correct the error if it was an error.

Ch. 497 of the Acts of 1918 provides that the licenses and tags are to be issued by the County Treasurer, the clerk to the County Commissioners in counties having no treasurer, and justices of the peace. The County Commissioners furnish the tags and licenses to the County Treasurer or county clerk and

to the justices of the peace. Sec. 197 of Art. 81, as re-enacted by this Act, provides:

> "When a license is issued by the justice of the peace, the said justice of the peace may retain as his fee for the issuance of said license, reporting the same, and remitting payment therefor, to the County Treasurer, or clerk of the County Commissioners in counties having no treasurer, the sum of twenty-five cents."

No provision is made for any compensation to the Treasurer, and the wording of this section seems to indicate that this was intended, and that the County Treasurer, as the tax collecting official, should collect these fees for the compensation which he receives for performing the duties of his office, which is fixed by local laws in each of the counties. This is borne out by Sec. 199 of Art. 81, as re-enacted by Ch. 497, which provides that any fund in excess of $1,000 remaining in the hands of the Treasurer after the payment of claims for damages, and unused for such purpose at the end of every fiscal year, shall be used by your board for one of two purposes; namely, either for the public schools or the public roads. It is obviously, therefore, the intention of the Act that the entire fund coming into the hands of the Treasurer either directly or from justices of the peace (in which case the justice makes the deduction for his compensation, as above set out) shall be used, first, for the payment of claims, and then any balance which may be left, shall be used by the County Commissioners only for one of the two objects set out in the Act; namely, the public schools or the public roads. No part of it can be diverted for any other purpose, and, therefore, no part of it can be paid to the County Treasurer.

I am, therefore, of the opinion that your board had no authority to pay out of this fund to the County Treasurer the $400 for which you gave him the warrant.

You suggest that you may have authority to pay the Treasurer for the additional help which the issuance of these tags and licenses made necessary, out of some other fund at your disposal. This, of course, is entirely possible, but it is a matter involving solely the construction of your local law on the sub-

ject, and is, I think, a matter for your counsel to decide. I, therefore, have not examined this question, and have no opinion one way or the other.

I am sending a copy of this opinion to Mr. Augustus Howard, Treasurer of Howard County, in accordance with your request.

Very truly yours,
ALBERT C. RITCHIE, *Attorney General.*

LICENSES—GARAGE—STORAGE WITHOUT CHARGE.

June 16, 1919.

Mr. Charles C. Wallace, Secy.,
The State Tax Commission,
Union Trust Bldg., Baltimore, Md.

MY DEAR MR. WALLACE: I have your letter of June 11th in which you ask whether a garage license must be obtained by a person maintaining a place where automobiles are stored for an uncertain period, and no charge is made therefor.

Garage licenses are prescribed by Sec. 166 of Art. 56 of the Code, as enacted by Sec. 704 of the Acts of 1916. This section defines the meaning of garage as used therein, and the definition is that it means "a place of storage for hire, or a place where there is kept for hire any automobile, etc."

Therefore, if a place is maintained where automobiles are stored, but such storage is *not* for hire, such place does not come within the definition of a garage, and is not obliged to be licensed.

Yours very truly,
ALBERT C. RITCHIE, *Attorney General.*

LICENSES—LIQUOR LICENSE REQUIRED OF CLUB FURNISHING LIQUOR TO MEMBERS.

February 26, 1919.

Josiah A. Kinsey, esq.,
Secretary, Board of Police Commissioners,
Court House,
Baltimore, Md.

DEAR MR. KINSEY: I beg to reply to your favor of February 14th, in which you state the three following cases:

1. Where an unlicensed club purchases liquor out of the funds in its treasury, and dispenses the same to its members without payment from them.

2. Where the unlicensed club taxes each member with his proportionate cost of the liquor acquired by the club.

3. Where the unlicensed club collects from its members before Sunday, buys liquor with this fund, and dispenses the same on Sunday to the subscribers.

Your inquiry in each case is whether the practice stated is lawful without a license.

Section 676A of the Baltimore City Charter (Act 1908, Ch. 281), makes it unlawful for any club "to *sell or furnish* intoxicating liquors to its members or guests" without first obtaining a club license. I think that in all three of these cases the club either sells or furnishes the liquor to its members, and that a license is, therefore, required. In the third case some question as to the application of the Sunday laws may be involved, but I understand that your inquiry only relates to the necessity for a license, and I, therefore, confine my reply to that point.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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LICENSES—LIQUOR—OBTAINING NEW RETAIL LICENSE IN BALTIMORE CITY.

June 16, 1919.

Mr. Louis I. Soloman, Secy.,
Retail Liquor Dealers Protective Assn.,
401 S. Bond Street,
Baltimore, Md.

MY DEAR MR. SOLOMAN: I have your letter of June 13th, in which you ask whether the holder of a retail liquor license in Baltimore City who surrenders such license July 1st, can obtain a new license thereafter in case the President issues a proclamation which has the effect of rescinding the war-time Prohibition Act.

The subject of retail liquor licenses in Baltimore City is covered by Section 672 of the Charter. There are only two kinds of retail licenses which the Board of Liquor License Commis-

sioners is authorized to issue. One is a full year's license, from May to May, and the other is a six months' license, from November 1st to May 1st. After a retail dealer surrenders his license on July 1st, he cannot get a new license before November 1st, but of course there is no reason why he cannot apply for such license and obtain it for the six months from November 1st. If he obtains such a license it will of course be subject to the going into effect of the 18th Amendment of the Constitution of the United States.

Very truly yours,
ALBERT C. RITCHIE, *Attorney General.*

LICENSES—LIQUOR LICENSES IN BALTIMORE COUNTY—REFUND—ACCOUNTING TO STATE BY CLERK OF COURT.

March 15, 1919.

T. Scott Offutt, Esq.,
Towson, Maryland.

DEAR MR. OFFUTT: I received your favor of March 6th, with reference to the inquiry submitted to you by the Clerk of the Circuit Court of Baltimore County.

You say that if persons desiring to take out liquor licenses in Baltimore County on May 1, 1919, are assured that in the event they are prevented by Federal legislation from selling liquor after July 1, 1919, the pro-rated portion of the license fee for the unexpired part of the year will be refunded, it is likely that many more licenses will be issued than would be the case without such assurance, and there would be a consequent benefit to the revenues of the State; and you ask whether such refund can be made.

Section 360 of the Baltimore County Code of 1916 provides that a license holder "who shall cease to traffic in such liquors during the term for which such license was issued," may surrender his license in the manner prescribed, and "shall be entitled to have the amount paid for such license refunded pro rata for the unexpired portion of the term for which such license was granted, less ten dollars." The refund is to be made by the Clerk of Court "out of such funds from the proceeds of liquor license fees as may be in his hands as clerk of said court

at the time, or if insufficient funds are in his hands at the time of presentation of such voucher and warrant, then out of the first funds from the proceeds of liquor license fees that come into his hands, and in his next regular statement and accounting to the State of Maryland he shall be entitled to full credit for the amount thus paid; such warrants to be paid in the order in which they are issued."

It is clear, I think, that if the sale of liquor is prohibited after July 1, 1919, then the holder of a liquor license in Baltimore County will "cease to traffic in such liquors during the term for which such license was issued," and, accordingly, the clerk of court will be required to make to such license holder the prescribed refund "out of such funds from the proceeds of liquor license fees as may be in his hands as clerk of said court at the time."

The only question, therefore, is whether there will be any such liquor license fees in the hands of the clerk on July 1, 1919, when the sale of liquor will be prohibited, or for a sufficient time thereafter for the procedure necessary to secure the refunds to be compiled with.

Section 353 of the Baltimore County Code of 1916 provides that "one-fourth of all moneys paid to the said clerk of court for license fees under the provisions of this Act shall be held by him for the use of the State and paid over and accounted for as money received for license has been heretofore accounted for," the remainder to go to the county, less collection fees.

The times when "money received for license has been heretofore accounted for" by the clerk are prescribed by Bagby's Code, Art. 17, Sec. 9, which provides that "on the first Monday of March, June, September and December in each and every year, each clerk shall pay to the treasurer all public money which he may have received, and on his failure to do so within thirty days thereafter," his bond may be put in suit, his commissions are forfeited and recovery on the bond is made evidence of misdemeanor in office, for which, upon conviction, the clerk may be removed.

The first Monday in June falls this year on June 2d, and thirty days thereafter expires on July 2d, so that if the clerk accounts to the State Treasurer by the close of business on July

2, 1919, he incurs no penalties under the above statute. Therefore, the fees collected from the May 1st licenses may be retained by the clerk, without penalty, until the close of business on July 2d, by which time he must account to the Treasurer, so that it is perfectly clear that the clerk may make refunds from such fees for all vouchers and warrants therefor which are presented to him before his accounting on July 2nd.

You apprehend, however, that this time will be too short for the procedure necessary, under Section 360, to secure the vouchers and warrants for all the refunds, and you ask whether the clerk's time for accounting can be extended until July 15, 1919, which would be sufficient.

The penalties which Section 9 of Article 17 of the Code prescribes for failure of the clerk to account within the thirty days, or, this year, on July 2d, are:

1. "His bond may be put in suit for the use of the State."

2. Such failure "shall amount to a forfeiture of the commissions to which he would otherwise be entitled."

3. Recovery on the bond "shall be evidence of misdemeanor in office, for which, upon conviction, he may be removed."

No one other than the State can put the clerk's bond in suit under this section (Schneider vs. Yellott, 124 Md. 92), and it is discretionary with the State whether to do this or not; and, of course, if the State does not sue, then the first and third penalties will not be enforced. Likewise, while the statute provides that the commissions are to be forfeited, yet such forfeiture must be to the State, and if the State does not enforce it, then I do not see who else can do so.

It is my opinion, therefore, that the clerk may safely delay his accounting until July 15, 1919, for the purpose of making the refunds, provided the proper officials of the State consent and are willing to assure the clerk that the penalties prescribed by Section 9 will not be enforced.

My own opinion is that the extension is both proper and desirable under the circumstances, and this will be my advice to any state officials who ask for my views. The power of deciding the question, however, is not mine, but rests rather with the

Governor, the Comptroller and the Treasurer, and it seems to me that your safe course would be to apply to them for some assurance in the matter.

I may add that the Comptroller's office advises me that it regards the extension as proper and reasonble.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—LIQUOR—POWER TO PRO-RATE STATE LICENSE—REFUND.

March 27, 1919.

Hart B. Noll, Esq.,
Clerk, Circuit Court,
Ellicott City, Maryland.

DEAR MR. NOLL: I beg to reply to the two inquiries contained in your letter of March 25.

You first state the case of a liquor license issued to Max Siegel on May 1, 1918, and transferred on July 15, 1918, to Aug. E. Wagener, who had purchased Siegel's saloon property. Subsequently, on March 12, 1919, the Circuit Court held this transfer void, on the ground that the license was not assignable. Thereupon you issued Wagener a two months' local license, at the pro rata cost, and requested the Comptroller for a two months' $100 additional license, under the Act of 1916, Ch. 594. The Comptroller, however, has declined to issue a two months' additional license under this Act, and to pro-rate the fee, contending that the whole year's fee must be paid. You ask whether this is correct.

In my opinion, it is. Licenses of this kind cannot be issued for fractional parts of the license year, unless the statute authorizes the same, and the whole year's fee is required to be paid, unless the statute authorizes it to be pro-rated. Your local law authorizes the local license to be issued for a fractional part of the year, and the fee, in this event, to be pro-rated, but the Act of 1916, Ch. 594, providing for the additional license, contains no provision authorizing its issue for less than the license year, and no provision authorizing the fee to be pro-rated. In Ruehl vs. State, 130 Md. 188, the Court of

Appeals recognized these additional licenses as licenses separate from the local licenses, and as there is no authority in the statute to pro-rate the fee, it follows that the whole year's fee must be paid, even though, as in the case you submit, the license be taken out at a time which leaves only two months to run.

You also ask whether persons who take out their local licenses ($500) and their additional licenses ($100) on May 1, 1919, will be entitled to a refund on July 1, 1919, for the remaining months of the license year, in case the sale of liquor is prohibited by federal enactment after July 1, 1919.

A refund for the unexpired portion of the license year can never be made unless the statute authorizes it. The licensee may cease business during the year, but in the absence of statutory authority there is no way for him to have any part of his fee refunded.

In Baltimore City and in Baltimore County, the local laws provide for refunds, so that in those localities the same can be made if the sale of liquor is stopped on July 1, 1919. On the other hand, when, under Act 1917, Ch. 13, the sale of liquor was stopped in Prince George's County on November 1, 1917, the Act made no provision for refunds, and accordingly, the licensees were compelled to apply for a legislative appropriation, which was made by the Act of 1918, Ch. 206, page 561.

The local law for Howard County is contained in the Act of 1892, Ch. 281, amended by the Act of 1902, Ch. 249, and there is no provision in either law authorizing refunds to be made in case the licensees cease business during the license year. If, therefore, the licenses, on May 1, 1919, take out their local and additional licenses for the whole year, paying the whole year's fees therefor, they cannot under the law receive any refund, in case the sale of liquor is stopped on July 1, 1919. In this event, their only recourse would be to apply for a legislative appropriation in 1920.

I think, however, that under Sec. 98D of the Act of 1902, Ch. 249, local licenses in Howard County need not be issued for the whole license year, but may be issued for fractional parts of the year, the fee, in such case, being pro-rated.

Therefore, local licenses may be issued on May 1, 1919, for two months only, the fee being pro-rated accordingly. If two months' licenses are taken out, then the same will expire on July 1, 1919, so that if the sale of liquor is prohibited after that day, there will be no question of any refund. This will take care of the situation so far as the local licenses are concerned.

The Act of 1916, Ch. 594, however, requiring the $100 additional licenses, contains no provision for a refund, and, as already pointed out, these licenses cannot be issued for less than the whole license year, or for less than the whole year's fee. With respect to these additional licenses, therefore, the entire $100 fee will have to be paid on May 1, 1919, and no part of this can be refunded, except by a legislative appropriation.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES — LIQUOR — REFUND OF LIQUOR LICENSE FEES — RESOLUTION OF BOARD OF PUBLIC WORKS.

June 20, 1919.

Adam Deupert, Esq.,
Clerk, Court of Common Pleas,
Baltimore, Maryland.

DEAR MR. DEUPERT: I beg to reply to your favor of June 17th.

The resolution of the Board of Public Works authorizing you not to return liquor license fees until July 20th, 1919, was intended to afford the time necessary to comply with the procedure for making refunds for any and all license fees as to which refunding is authorized by law, in the event that the sale of liquor is prohibited on July 1st.

Licenses to ordinary keepers are provided for by Bagby's Code, Art. 56, Secs. 72 to 86. Sec. 73A, which was added by the Act of 1914, Ch. 335, expressly provides for refunds when "the business conducted in such premises shall cease during the term for which said license was granted."

The resolution of the Board of Public Works was intended to cover just such a case as this, and you are, therefore, fully

authorized to hold ordinary license fees until July 20th, and in the meanwhile, to make the proper refunds under Sec. 73A, on account of all such ordinary licenses as may be surrendered as of July 1st.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—MOVING PICTURE THEATRES—VAUDEVILLE—DIFFERENT COMPANIES—TRANSFERABLE AND NON-TRANSFERABLE.

February 17, 1919.

William L. Seabrook, Esq.,
State's Attorney,
Westminster, Maryland.

DEAR MR. SEABROOK: I beg to answer the several questions submitted in your letter to me of February 10, 1919.

1. You first ask whether the license for a moving picture theatre, issued under Act 1916, Ch. 704, Sec. 165, can be transferred by the holder to the person to whom he assigns his theatre lease, or whether the assignee must take out a new license.

Sec. 2 of Art. 56 of Bagby's Code provides that no license shall protect any person acting thereunder "unless he is named therein, or is entitled as a representative, or assignee under the provisions hereinafter contained in this article." The person to whom the lease is assigned is, of course, not named in the license, nor is he the representative of the holder of the license, and the only assignees who can receive the benefit of the license are those entitled thereto "under the provisions hereinafter contained in this article." The provisions referred to are found in Secs. 56 and 57, and they apply only to liquor licenses, traders' licenses and cigarette licenses.

See Opinions of Attorney General, Vol. 1, page 207.

For these reasons, it seems to me that a moving picture license cannot be transferred to the assignee of the theatre lease, because it is not embraced in the only kinds of licenses which the law permits to be transferred. I see no reason why the Legislature should not authorize such licenses to pass with the theatre, but until the Legislature does this, and provides machinery for recording the transfer, it seems to me that the assignee of the theatre must take out a new license.

2. You next ask whether a moving picture theatre, which is licensed as such, is entitled to have vaudeville performances by a stock company under its moving picture license, or whether it must also take out a players' license. While the law is not entirely clear, my opinion is that the moving picture license is for moving pictures only, and that if such vaudeville performances are to be given, the player's license required by Bagby's Code, Art. 56, Sec. 108 (Act 1916, Ch. 704), must also be taken out. See Opinions of Attorney General, Vol. 1, page 197.

3. You also ask whether the theatre proprietor can take out one $50 annual license under Sec. 108 of Art. 56 of Bagby's Code, and exhibit different companies of stage players under that throughout the year. I do not think that he can. The license in question is not imposed upon the theatre, but upon the company, and each company must either have a $50 annual license or a $2.00 license for each exhibition.

4. Finally, of the several kinds of licenses you name, I think the following are transferable: Traders' licenses and cigarette licenses, under Bagby's Code, Art. 56, Secs. 2, 56, 57 and 58. See Opinions of Attorney General, Vol. 1, page 207.

And I think that the following are non-transferable: Billiard licenses (see Opinions just cited), and all the licenses required by the Act of 1916, Ch. 704, for the reasons given above in discussing the transferability of moving picture licenses.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—PEDDLERS SELLING FROM AUTOMOBILES.

June 20, 1919.

Charles C. Wallace, Esq.,
Secretary, State Tax Commission,
Baltimore, Maryland.

DEAR MR. WALLACE: I beg to reply to your favor of June 17th.

Whether or not Bagby's Code, Art. 56, Secs. 24, 25, etc., apply to peddlers who (in counties other than those excepted) sell from automobiles, depends, of course, upon whether automobiles are included in the words "wagon or other vehicle."

It seems to me that these sections were evidently intended to cover all peddlers, and I think that the words "other vehicle" should be construed as applying to automobiles, and that the peddlers selling from automobiles should be required to take out a license. If this is not so, then a peddler could avoid the necessity of a license by selling from an automobile instead of from a wagon, and I do not think that this was intended by the Legislature.

This opinion is in accordance with my letter on the same subject to the Comptroller, July 10th, 1916, Attorney General's Opinion, Vol. 1, p. 198.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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LICENSES—REAL ESTATE BROKERS—AGENCIES IN DIFFERENT COUNTIES.

May 29, 1919.

Messrs. Brown & Bartley,
Elkton, Maryland.

GENTLEMEN: I beg to reply to your favor of May 21st, in which you ask whether the E. A. Strout Farm Agency, which maintains real estate brokerage agencies in different counties of the State, is required to take out a real estate brokerage license in each county in which it operates, or whether one license will cover the entire State.

The State law requiring licenses for real estate brokers is codified as Sections 12, 18, 20 and 21 of Article 56 of Bagby's Code, and it is my opinion that these sections contemplate that a separate license must be taken out in each county of the State in which the real estate brokerage business is conducted.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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LICENSES—RESTAURANTS OR EATING PLACES.

May 5, 1919.

Preston B. Ray, Esq.,
Clerk, Circuit Court for Montgomery Co.,
Rockville, Maryland.

DEAR SIR: I have your letter of April 28th, in which you ask me whether a person who is a lock-tender on the Chesapeake & Ohio Canal, and who furnishes meals to a number of fishermen during the fishing season, is required to take out a license under Section 182 of Chapter 704 of the Acts of 1916.

If this person merely has a contract to furnish certain fishermen with meals, then I do not think that he would be required to obtain a license; but, if he undertakes to furnish meals to any fishermen, or any one else who may desire to patronize his place, then I think that he is required to take out a license. See 1 Opinions of Attorney General, p. 204.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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LICENSES—STOCK BROKERS—DEFINITION.

May 23, 1919.

Messrs. McComb & Crane,
207 Goff Building,
Clarksburg, W. Va.

GENTLEMEN: Section 15 of Article 56 of the Annotated Code of Maryland provides that any person or partnership pay-

ing the sum of thirty dollars may obtain a license for carrying on the business of stock broker in the City of Baltimore.

Section 17 provides that any person who shall make it a business to deal in any manner upon his own account, or for others, in the purchase or sale of stocks, bills, notes, bank notes or other obligations shall be deemed and taken to be a broker.

I think that this description covers the business in which you are engaged and that, therefore, it will be necessary for you to obtain a license before doing business in the City of Baltimore.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—TRADERS—ASSEMBLING MOTOR ATTACHMENTS NOT MANUFACTURING.

April 28, 1919.

The Graham Bros. Sales Co.,
140 *W. Mt. Royal Ave.,*
Baltimore, Md.

GENTLEMEN: I have Mr. Linsenmeyer's favor of April 15th, asking whether in my opinion you are a manufacturer, and therefore not required to take out a Trader's license, under Bagby's Code, Art. 56, Sec. 38.

I understand that you do not yourself manufacture anything, but what you do is to buy and assemble attachments for the purpose of converting cars of one kind into another kind. For instance, of converting a pleasure car into a truck.

Under these circumstances, it does not seem to me that you are a manufacturer.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—TRADERS—BRANCH STORES IN DIFFERENT COUNTIES.

February 3, 1919.

Morris & Company,
Pratt and Howard Streets,
Baltimore, Md.

GENTLEMEN: I beg to reply to your favor of January 31st, in which you say that you have opened a branch office in Wor-

cester County, and desire to know whether you are required to take out a trader's license in that county, in addition to the license you already have authorizing you to do business in Baltimore City.

The Court of Appeals has held, in Salfner vs. State, 84 Md. 299, that a trader's license is required in every county in which the holder has "any store or fixed place of business." In that case the Court held that even a wagon, from which sales and deliveries were made, was a fixed place of business within the meaning of the statute.

You do not say how you propose to operate in Worcester County, but if you will have a store or fixed place of business there, from which sales and deliveries are to be made, then you will be required to take out a trader's license from the Clerk of the Circuit Court.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—TRADERS—DEALERS IN FERTILIZER.

August 9, 1919.

Charles C. Wallace, Esq.,
Secretary State Tax Commission,
Union Trust Bldg., Baltimore, Md.

DEAR MR. WALLACE: I have your letter of August 4th, in which you ask me whether dealers in fertilizers are required to procure a trader's license when the inspection fee of $10.00 provided for by Sec. 3 of Art. 61 of the Annotated Code (4th Vol.) has been paid by the manufacturer.

Sec. 3 provides that when the required inspection fees have been paid, no other person selling the same goods under his name and brand shall be required to pay *such* fee. It is clear that the Act only exempts payment so far as the inspection is concerned, and has no reference whatever to the provisions of Art. 56 requiring trader's licenses.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

LICENSES—TRADERS—HAWKERS AND PEDDLERS.

October 13, 1919.

Preston B. Ray, Esq.,
Clerk of the Circuit Court,
Rockville, Maryland.

MY DEAR MR. RAY: I have your letter of October 7th enclosing a letter from Mr. Walter A. Johnston, an attorney of Washington, D. C., in which he asks whether a client of his can deliver butter, eggs and cheese to store-keepers in Montgomery County, and receive the cash therefor on delivery, and if so, what license, if any, must be paid in order to engage in this business.

Art. 56, Sec. 38 of the Code prohibits any person other than the grower, maker or manufacturer from bartering or selling any goods, wares or merchandise within this State without first obtaining a license. The Court of Appeals has held that a wagon is a place of business under this section.

Salfner vs. State, 84 Md. 302.

I should say, therefore, that Mr. Johnston's client must take out a trader's license before doing such a business as he contemplates.

If his business is not fixed or run on regular lines, but is more or less in the nature of that of a hawker or peddler, then he should obtain a license under Secs. 24 and 25 of Art. 56. I think, however, from Mr. Johnston's letter that his client would be a trader and will have to take out a license based upon the average amount of goods he would carry in his delivery wagon.

I am returning Mr. Johnston's letter, so that you can write to him.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

MOTION PICTURE CENSORS.

RELIGIOUS EXHIBITIONS WHERE ADMISSION FEE IS CHARGED —RULES OF BOARD.

April 18, 1919.

T. E. Stacy, Esq.,
Secretary, B. & O. Y. M. C. A.,
1800 *Webster St., Baltimore, Md.*

DEAR MR. STACY: You asked me whether the reels exhibited by the B. & O. Y. M. C. A. must be submitted to the Board of Motion Picture Censors, in case an admission fee is charged to see them, the proceeds being devoted solely to necessary expenses, and any balance to your Y. M. C. A. work.

Sec. 22 of the Motion Picture Law provides that the Act shall not apply to exhibitions for "purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning."

The purpose of your exhibitions is, of course, a religious purpose, but it is not clear from the language of the Act whether exhibitions for religious purposes are intended to be exempted when an admission fee is charged, or only when they are free. Since the Act is not clear on this point, I think the board has the power, under Sec. 16, to resolve the doubt by adopting a rule upon the subject. The Board advises me that it has such a rule, and that this rule requires the reels to be submitted to the board in all cases mentioned in Sec. 22, if an admission fee is charged. I think that this settles the question, and requires your reels to be submitted.

I may add that the reason for the rule seems to be that if religious films do not have to be submitted, where an admission fee is charged, then educational, charitable and fraternal films do not have to be submitted either, but all such films can be exhibited for pay without any censorship at all; and innumerable exhibitors would claim to fall in one of these four classes and would ask exemption, with the result that the board's supervisory powers would be very much limited. For this rea-

son the board feels that it can only allow such exemptions where the exhibitions are free.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MOTION PICTURE CENSORS—RIGHT OF EMPLOYEES OF BOARD TO ENTER THEATRE WITHOUT ADMISSION FEE OR WAR TAX.

January 6, 1919.

Charles E. Harper, Esq., Chairman,
Md. State Board of Motion Picture Censors,
204 E. Lexington Street, Baltimore, Maryland.

DEAR SIR: You asked me whether employees of your board may be prevented by the owner or manager from entering, without paying the admission fee, any place where motion picture films are exhibited.

Sec. 14 of Ch. 209 of the Acts of 1916 provides that any member or employee of the board may enter any place where films, reels or views are exhibited. Sec. 20 of the Act imposes a penalty upon any person who violates any of the provisions of the Act. If any person in charge of a place exhibiting motion pictures should undertake to prevent an employee of your board from entering, he would, in my opinion, be violating the law, and would become subject to the penalty provided by Sec. 20.

You inform me that efforts have been made to bar your employees on the ground that they should pay the war tax. The Federal Law imposing taxes on places of amusement does not attempt to tax officers of the State. Your board is a State Board, and its employees are to be considered State officers within the meaning of the tax law. As to them, therefore, the tax does not apply.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD OF BALTIMORE CITY.

CONSTABLES — RIGHT TO STAND AUTOMOBILE FOR HIRE IN FRONT OF OWNER'S PREMISES.

October 13, 1919.

Josiah A. Kinsey, Esq.,
Secretary, Board of Police Commissioners,
Court House, Baltimore, Maryland.

DEAR SIR: I have before me your recent inquiry whether under the provisions of Ch. 109 of the Acts of 1910, and Ordinance 139 (approved June 4, 1908) of the Mayor and City Council of Baltimore, your board can interfere with a person who attempts to stand his automobile for hire in front of his own premises.

Sec. 286 of Ch. 109 authorizes your board to designate certain places to be used as public or private stands for hackney carriages. Sec. 6 of Ordinance 139 prohibits any hack, while waiting employment by passengers, from standing upon any public street other than at public or private stands designated by your board. The ownership of a house does not give the owner any right over the use of the public highway in front of that house superior to that permitted by law to other citizens in respect to using that highway for public business. Such an owner must conform to all police regulations of the city, and be subject to them. If the proper authorities find that his street is not suitable for hackstands, he cannot use it for such a purpose. Whatever interest he may have in the bed of the street is subject to the public regulation of traffic by which he must abide.

It is therefore my opinion that the board has the right to refuse to grant applications to a person who desires to stand an automobile for hire in front of his own house, if your board should feel that the granting of such application will interfere improperly with public traffic.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

POLICE BOARD—CITY DOG ORDINANCE—RELATION TO ORDER OF STATE BOARD OF AGRICULTURE.

June 2, 1919.

Josiah A. Kinsey, Esq.,
Secy. Board of Police Commissioners,
Court House, City.

DEAR MR. KINSEY: I beg to reply to your favor of May 30th, in which you ask whether Ordinance No. 138, approved June 3rd, 1908, and known as the "Dog Ordinance," affects in any way the opinion I gave you on May 29th, with reference to the quarantine established by the State Board of Agriculture against rabies within the limits of Baltimore City.

The Ordinance in question does not affect the quarantine. Sec. 11 of the Act of 1916, Chapter 337, provides that "all rules and regulations formulated and issued by said board in pursuance of the powers hereby conferred on it shall have the force and effect of laws, and all violations of such rules or regulations shall be punished as misdemeanors are punished at common law."

The quarantine against rabies results from an order of the State Board of Agriculture, and under Sec. 11 this order has the effect of law.

It seems to me quite clear that the quarantine is legal, and that it is the duty of the Police Board to enforce the same by causing dogs found running at large within the city limits to be destroyed. The only difficulties, I see, are those relating to the manner, time and place in which the dogs should be destroyed. It seems to me that the Police Board should confer with the representatives of the State Board of Agriculture and also of the City of Baltimore, which has, I believe, a contract for the destruction of dogs, and this conference can work out the practical consideration involved.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—DESTRUCTION OF DOGS WHEN ORDERED BY THE STATE BOARD OF AGRICULTURE.

May 29, 1919.

Josiah A. Kinsey, Esq.,
Secy. Board of Police Commissioners,
Baltimore, Maryland.

DEAR MR. KINSEY: I beg to reply to your favor of May 23rd, in which you ask my opinion as to the responsibility and duties of the Police Board under the order passed by the State Board of Agriculture for the destruction of dogs found running at large within the limits of Baltimore City, as well as within certain areas of Baltimore County.

The order states that rabies exists in the areas in question, that the areas are accordingly quarantined and that all dogs found running at large within such quarantined areas will be destroyed, and sheriffs, deputy sheriffs, constables and other officers are instructed to enforce the quarantine.

Under Sec. 2 of the Act of 1916, Ch. 337, the State Board of Agriculture is authorized to establish, maintain and enforce such quarantine regulations as it may deem necessary, for the purpose of protecting the health of the domestic animals of the State from all contagious and infectious diseases.

Rabies is a contagious or infectious disease, as is recognized by Sec. 7 of the law, which requires veterinarians to report as such all cases of "rabies or hydrophobia;" and I must assume that the orders of the State Board of Agriculture mean that the board has, in good faith, determined that the protection of Domestic animals requires a quarantine against rabies in the areas in question. This being so, I think that the quarantines are authorized by Sec. 2.

Sec. 5 authorizes the State Board of Agriculture to prescribe such regulations as they may deem necessary or expedient to prevent infection or contagion being communicated in quarantined places, and "to call upon all sheriffs and deputy sheriffs, constables, policemen or other officers of the State, the City of Baltimore, or of any county, for information and assistance to carry out and enforce the provisions of such orders and regulations; to prescribe regulations for the destruction of animals affected with or exposed to an infectious or contagious disease

* * * and it shall be the duty of all sheriffs and deputy sheriffs, constables, policemen or other officers of the State, City of Baltimore, or counties, to obey and observe all orders and instructions which they may receive from said State Board of Agriculture, or its duly authorized officers or agents, in the enforcement of the provisions of this Act within their respective jurisdictions."

It seems to me that this section is broad enough to include dogs afflicted with rabies; and that it authorizes the State Board of Agriculture to pass the orders they have passed requiring the officers named to destroy dogs found running at large within the quarantined areas. Such areas have been quarantined, under Sec. 2, because found by the board to be infected with rabies, and dogs running at large therein are, in the language of the statute, "exposed to an infectious or contagious disease," so that the board may, under Sec. 5, prescribe regulations for their destruction.

I also refer you to the case of Hagerstown vs. Witmer, 86 Md. 293, and the authorities there cited.

My opinion, therefore, is that it is the duty of the Police Board of Baltimore City to enforce the quarantine within the limits of Baltimore City, and to carry out the orders of the State Board of Agriculture with reference to the destruction of dogs found running at large within the City limits.

The manner in which such dogs are to be apprehended and destroyed is a practical matter, and should, I think, be determined by the Police Board in accordance with its judgment as to how this can best be done.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—DEFENSE OF OFFICER ON TRAIL IN CRIMINAL COURT.

July 23, 1919.

Josiah A. Kinsey, Esq.,
Secy., Board of Police Commissioners,
Court House, City.

MY DEAR MR. KINSEY: I have your favor of July 21st in which you ask whether my department will represent Officer

Peppersack at his trial in the Criminal Court upon indictment charging him with shooting with intent to kill in connection with an arrest for violation of the speed laws.

I note that before the organization of the State Law Department, it was the custom of your Board to assign your own counsel to defend officers under indictment for offenses committed in the line of police duty.

It seems to me, however, impossible to continue this custom now. The Attorney General tries all criminal appeals in the Court of Appeals, so that if Officer Peppersack is convicted and takes an appeal, it will be the duty of my department to represent the State in the Court of Appeals. For this reason my department could not defend the officer in his trial in the lower Court.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—HACKNEY-CABS, INSTALLATION OF TAXI-METERS.

July 25, 1919.

Josiah A. Kinsey, Esq.,
Secy., Board of Police Commissioners,
Baltimore, Maryland.

DEAR MR. KINSEY: I beg to reply to your favor of July 23rd, asking whether the Police Board has power, under Secs. 281 to 286 of the Baltimore City Charter, to require the owners of motor hackney vehicles to equip their cars with taxi-meters, so as to register the distance travelled and the amount charged.

Sec. 281 of the Charter authorizes the board to "fix rates of fare and amounts to be charged" by the owners of such vehicles, and Sec. 282 requires "the rates of fare and charges prescribed" by the board to be posted inside the vehicles themselves.

This is simply an authority to fix rates and does not extend to requiring taxi-meters. Since the statute confers no power to require taxi-meters, it follows that the board cannot order them to be installed.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—HACKNEY STANDS, ESTABLISHMENT OF.

June 16, 1919.

The Board of Police Commissioners,
Court House,
Baltimore, Maryland.

GENTLEMEN: I have your letter of June 12th in which you state that some of the private hackney stands established by you under the provisions of Ch. 109 of the Acts of 1910 conflict with the new City Parking Ordinance, No. 502, approved May 8th, 1919.

You ask whether your authority to establish such stands under the Act of 1910 is restricted by the ordinance.

In the case of Swann vs. your Board, 132 Md. 256, the Court of Appeals determined that the Act of 1910, Chapter 109, superseded all other legislation or ordinances in the matter of establishing hackney stands. Since the decision in that case, there has been no additional legislation conferring on the Mayor and City Council any right to pass ordinances which interfere with the Act of 1910. This Act, therefore, is not in any way affected by the passage of Ordinance No. 502, and in case the latter conflicts with it, the ordinance must give way.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—LIQUOR LAW OF BALTIMORE CITY PROHIBITS 2¾% BEER.

July 11, 1919.

Josiah A. Kinsey, Esq.,
Secy., Board of Police Commissioners,
Court House, Baltimore, Md.

DEAR MR. KINSEY: I beg to reply to your favor of July 9th, asking whether beer containing 2¾ per cent of alcohol can be sold by persons who have no liquor license.

I understand that the Federal Government, in its enforcement of the war-time prohibition law, is not at present interfering with the sale of beer containing 2¾ per cent alcohol, the United

States Circuit Court having held that that law only prohibits the sale of beer which is intoxicating, and having declined to hold that 2¾ per cent beer is intoxicating.

Whether such beer can be sold in Baltimore City without a liquor license depends, however, not upon whether it is in fact intoxicating, but upon whether a liquor license is required by the Baltimore City Charter, and under Sec. 667 of the Charter a liquor license is required for the sale of all fermented and distilled liquors, and every mixture of liquors, "which shall contain more than 2% by weight of alcohol."

It is clear, therefore, that under the express provisions of the Charter beer containing more than 2% of alcohol cannot be sold in Baltimore City without a liquor license, and, therefore, persons selling 2¾ per cent beer are required to have such a license.

This is in accord with opinions rendered the Police Board by its former counsel, Mr. Alonzo L. Miles, on July 10th, 1908, and Judge Robert F. Stanton on July 25, 1913.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—MAGISTRATES—RIGHT OF POLICE MAGISTRATE ASSIGNED TO ONE DISTRICT TO ACT IN ANOTHER DISTRICT.

April 21, 1919.

Josiah A. Kinsey, Esq.,
Secy., Board of Police Commissioners,
Court House, Baltimore, Md.

DEAR MR. KINSEY: Sometime ago you asked my opinion whether a police magistrate, assigned to one district, can go into another district and there release a prisoner for hearing.

The question arose in the case of a man who had been arrested in the Central District, and the magistrate of the Western District came to the Central District, and, in the absence of the magistrate of the Central District, released the accused for a hearing on the following morning. On the following morning the accused appeared, and the magistrate of the Central District, who was then in attendance, committed him for Court.

Not the slightest harm, therefore, resulted in that case from the release, but the question of the authority of the magistrate of the Western District to make it was raised, and you submitted this question to me for the Police Board's future guidance.

The question involves the construction of Secs. 278H to 278 I, and Secs. 630-632, 632F, 635, 637, 638, 641, 642 and 757 of the Baltimore City Charter, and a consideration, also of the following authorities:

Brish vs. Carter, 98 Md. 445, 452;
Levin vs. Hewes, 118 Md. 624, 642;
Smith vs. Hackett, 129 Md. 73, 76;
Queen vs. State, 116 Md. 678, 679;
Thomas, Procedure in Justice's Cases, Sec. 35;
Baldwin vs. Phelan, Baltimore City Court, Judge Dobler, Appeal Docket 1899f, 125, 22 Daily Record, 202;
Ex Parte Hasson, Baltimore County, Judge Burke, October 15, 1898, 21 Daily Record, 368;
Judges Henderson and Motter, Frederick County, March 1, 1899, 36 Daily Record, 34.

I am citing these authorities for purposes of future reference only, because, for the reasons about to be stated, I feel that it may be best at this time not to decide the question.

The question is a doubtful one, and lawyers might well differ with regard to it. Indeed, in Queen vs. State, 116 Md. 678, the Court of Appeals, when the same question was raised as to county magistrates, declined to pass upon it, and decided the case on other grounds.

On the one hand, if a magistrate regularly assigned to one district can, of his own volition, go into another district and there accept bail, then there would seem to be little reason why such magistrate could not also, of his own volition, try the case. The power to do this would hardly fit in with our theory of district assignments, and if such practice were frequent it is easy to see that it might lead to abuse.

On the other hand, if the regularly assigned magistrate is sick or inaccessible, a serious hardship may be inflicted upon prisoners who are entitled to bail, unless the magistrate from some

other district can give it, and instances in which harm could result from this, if they ever occurred at all, would be exceedingly rare.

I think, as a practical matter, it would be unfortunate if the conclusion I reached should be that magistrates could not release on bail under the circumstances last mentioned; and if the conclusion I reached should be that magistrates could release under these circumstances, then it would also be unfortunate if it should follow from that, as might be the case, that magistrates could not only release on bail, but could also try the case, in districts other than their own.

As a practical matter, I feel that there is no reason to deny the right of a magistrate to go into a district other than his own, provided (1) he does so for the sole purpose of accepting bail, and not of trying the case, (2) he only does this in cases where the magistrate regularly assigned to that district is sick or inaccessible, and (3) the practice is understood by all the magistrates.

I am advised that these are the conditions under which the practice is resorted to, and if so, then I think that the practice may properly be allowed to continue, without my undertaking to settle the really doubtful question of law involved.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—PROBATIONARY PATROLMAN, CREDITING WITH TIME SPENT IN MILITARY OR NAVAL SERVICE.

May 20, 1919.

Mr. Josiah A. Kinsey,
Secy., Board of Police Commissioners,
Court House, Baltimore, Md.

MY DEAR MR. KINSEY: I have your letter of May 9th, in which you ask whether under the provisions of Section 745½ of the Baltimore City Charter as enacted by Chapter 129 of the Acts of 1918, the Board of Police Commissioners is authorized to give credit to a probationary policeman who has been in the military or naval service of the United States, and has been

reinstated by the Board, for the time spent in the Government service.

Chapter 23 of the Acts of 1918, authorizes the Board to reinstate "in their former rank or grade" all the members of the Department who may have left for the purpose of entering the military or naval service of the United States upon their return from such service, provided such persons shall pass a satisfactory physical examination.

Section 745½ provides for the grades of patrolmen based upon the length of service "on said force."

The returning patrolmen are reinstated to their former grade, and thereafter they can only be advanced after they have served *on the police force* the required length of time. It seems to me that the Legislature did not authorize the Board to count in the time of service the period spent in the military or naval service of the United States. On the contrary, the wording of Chapter 23 of the Acts of 1918 seems to indicate that the Legislature did intend this time not to be counted.

I regret very much, therefore, that I have to advise you that the Board of Police Commissioners cannot legally give probationary policemen credit for the time they spent in the Government services when it is advancing their grades.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—RESIDENTIAL REQUIREMENTS, NONE FOR MEMBERS OF THE FORCE—RULES OF POLICE EXAMINERS.

January 28, 1919.

Mr. Josiah A. Kinsey,
Secy., Board of Police Commissioners,
Court House, Baltimore, Md.

DEAR MR. KINSEY: I beg to reply to your favor of January 24th, in which you say that a number of men recently discharged from military service desire to join the police force, but that these men, while intending to make Baltimore their home, are not yet citizens of Maryland, and, of course, are not registered voters of Baltimore City; and you ask whether they are eligible for appointment.

The police laws contain no residential requirements for members of the force, and, of course, Section 26 of the Charter, requiring municipal officials, except females, to be registered voters of Baltimore City, does not apply because policemen are not municipal officials. Nor does Section 12 of Article 69 of Bagby's Code, requiring persons appointed by State and county officials to be residents, apply to the police force of Baltimore City, because the police force is governed by the special provisions of the Baltimore City Charter.

There is, therefore, no legal prohibition against men who intend to become citizens of Maryland and residents of Baltimore, but who have not yet done so, unless the Board of Police Examiners, under Section 745D of the Charter, have adopted a rule making such citizenship or residence a necssary qualification. In the absence of such a rule, the men, in my opinion, are legally eligible for membership on the police force.

Since the Board of Police Examiners have the power to adopt the rule upon the subject, it seems to me that the question is really for them, in their discretion, to decide; and I suppose they would be governed by their view as to whether the capacity and fitness of applicants can properly be determined, in accordance with the standards and conditions of Sections 745D and 745E of the Charter, if the applicants have just moved into the State.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—RESOLUTION OF CITY COUNCIL CANNOT REPEAL ORDINANCE.

Mr. Josiah A. Kinsey, July 24, 1919.
Secy., Board of Police Commissioners,
Court House, Baltimore, Md.

DEAR MR. KINSEY: In the absence of the Attorney General, who is out of the city, I beg to reply to your letter asking whether it is the duty of the Board of Police Commissioners to recognize the joint resolution of the City Council asking that the operation of the Parking Ordinance be suspended in certain particulars.

No resolution of the City Council can have the effect of repealing or amending an existing ordinance which has been regularly passed and approved by the Mayor. The law, therefore, is the same now as if the resolution had never been passed.

I gather from the language of the resolution that the ordinance has been found to be discriminatory and to work unnecessary hardships. If this is true, the only remedy is by way of an amendment, and until that action is taken, the manner in which your Board will enforce the provisions of the ordinance is a matter exclusively of administration which the Board will determine for itself.

Very truly yours,

PHILIP B. PERLMAN, *Asst. Attorney General.*

POLICE BOARD—SPECIAL OFFICERS—ROLAND PARK COMPANY.

March 19, 1919.

Mr. Josiah A. Kinsey,
Secy., Board of Police Commissioners,
Court House, Baltimore, Md.

DEAR MR. KINSEY: I beg to reply to your favor of March 15th, in which you ask whether the Police Board is authorized, in accordance with the request of the Roland Park Company, to appoint a special police officer for the suburban settlement known as Guilford. A considerable portion of Guilford is unsold and owned by said company, including the company says, all the streets, except York Road and Charles Street.

The board is, I think, clearly authorized to appoint such a special police officer, at the request of the Roland Park Company, under the Act of 1906, Ch. 471, subject, of course, to the conditions set forth in that Act.

The Roland Park Company also wishes to know whether such special police officer, in addition to preserving the peace in Guilford, will have power to regulate traffic there so as to keep heavy trucks off the private roads of the Roland Park Company, and thus preserve these roads from destruction.

The Act of 1906, Ch. 471, provides that any special police officer appointed thereunder shall enforce the laws and ordinances of Baltimore City in and about the locality specified in the application, and also shall have the power "to preserve the public peace, prevent crime, arrest offenders and *protect the rights of persons and property* in and about such locality and premises as fully as a regular police officer of Baltimore City."

I have no data before me to show whether or not the roads in question are the private roads of the Roland Park Company, in the sense that the public has no right to use them; but assuming that they are, then the company has, of course, the right to deny the use of these roads to the public; and in this event the special police officer would have the authority to keep traffic off of them, under his power to "protect the rights of persons and property."

I return you the letter to your board from the Roland Park Company, as well as the plat of Guilford.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

POLICE BOARD—SUNDAY LAWS—RIVER VIEW PARK.

March 15, 1919.

Josiah A. Kinsey, Esq.,
Secy., Board of Police Commissioners,
Court House, Baltimore, Md.

DEAR MR. KINSEY: I received your favor of February 26th, asking my advice as to the board's "duty and responsibility" in the matter of the continuance next summer of the amusements at River View Park on Sundays.

This involves the right of the owner of the Park, on Sundays, to maintain a band, to sell soft drinks, ice-cream, sausages, candy, soda-water, etc., and to operate gravity railway and canal, ferris-wheel, merry-go-around, circle swings, etc., for the use of which a small fee is charged.

The right to do these things on Sundays exists unless made unlawful by the Sunday law of 1723, codified as Sects. 436-437

of Art. 27 of Bagby's Code, and recently construed in part by the Court of Appeals in the Sunday Baseball Case, Levering, *et al.*, vs. Park Board, decided February 13, 1919.

These laws have always been understood as permitting work of necessity on Sundays, and the only legal question, as I view it, is whether the labor involved in the above amusements can properly be regarded as work of necessity.

The facts are that all these things have been done at River View Park during the summer seasons for over ten years, without anyone, I am advised, objecting on the ground that the Sunday laws were being violated. The park has always been operated in a thoroughly law-abiding manner so far as the prevention of every kind of disorder or misconduct is concerned. The amusements on Sunday afford a healthy recreation from work and a needed and welcome relief from the summer heat to thousands of persons, the Sunday attendance in 1918 often exceeding 20,000.

Under these circumstances, the Police Board's duty and responsibility, in my opinion, do not require it to prohibit now the continuance of these amusements at River View Park on Sundays, but the Board may, with entire regard to its duty and responsibility, permit them to continue in the same orderly manner in which they have been conducted without objection for so long, any one feeling that the same constitute a violation of the Sunday law being free at any time to have that question determined through appropriate legal proceedings.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

STATE LUNACY COMMISSION.

LIABILITY OF COUNTY FOR CARE OF INSANE SOLDIER RESIDENT THEREIN.

June 2, 1919.

Dr. Arthur P. Herring, Secy.,
State Lunacy Commission,
330 N. Charles St., Baltimore, Md.

DEAR DR. HERRING: On April 17th last you asked my opinion as to the liability of Charles County for the care of an insane soldier. I told you that I would endeavor to adjust the matter with Charles County, but having been unable to do this, I now give you my opinion upon the question.

The correspondence shows that the soldier in question is insane; that he is being held at Fort Ontario, N. Y., by the military authorities, and that his mental trouble was not due to war service, but existed before his entrance into the Army. I also understand that the man is a resident of Charles County.

Under these circumstances, it is my opinion that this soldier is a proper charge upon Charles County, and if the County Commissioners of Charles County will not consent to his commitment at the County's expense, under Secs. 1 and 37 of Art. 59 of Bagby's Code, then he can be committed under Section 31, upon the certificate of two physicians, without the County's consent, and in this event Charles County will be liable for his maintenance, in accordance with Section 45 of Article 59.

The military authorities say that they will deliver the man to any point in Maryland you designate. Accordingly, you can give the appropriate directions, meet the man upon his arrival and arrange for his examination by two physicians. Upon their certificate, he can be committed and his expense charged to Charles County, under Section 45.

While this is the procedure which, in my opinion, you have a right to follow, yet it may be, as you indicated over the telephone this morning, that you might prefer taking up the matter again with the Government authorities.

I return you the correspondence you sent me.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

STATE LUNACY COMMISSION—EXAMINATION OF PRISONERS—FEES.

October 14, 1919.

Dr. A. P. Herring,
The Lunacy Commission,
330 N. Charles Street,
Baltimore, Md.

MY DEAR DR. HERRING: I have your letter of October 3rd, in which you state that the Lunacy Commission has had several prisoners brought to its office for examination under Chapter 68, Laws of 1918, and you ask whether the members of the Commission, who make this examination, are entitled to charge a reasonable fee for their services, just as they do when they go to Court to make a similar examination.

This question is covered by Sec. 16 of Art. 59, enacted by Ch. 68 of the Acts of 1918. This Act was an act providing for compensation and expenses, for each member of the Commission is a physician, including the Secretary. The Court, under this Act, is the proper authority to allow a fee to the Commission for their services. It is not necessary that you be summoned to make this examination in Court, but in order to get a fee it is necessary that the examination be ordered by the Court either under Sec. 4 of Art. 59, or at the instance of the prisoner or under Art. 6 of Sec. 59.

It seems to me that when you examine prisoners, whether at your office or at any other place, you must examine them under an order of Court passed under one of these two sections. If this is done, you have the right to charge a reasonable fee, which, however, the Court must authorize by an order passed in the case in which the examination is directed as provided by Chapter 68.

Yours very truly,

OGLE MARBURY, *Asst. Attorney General.*

STATE LUNACY COMMISSION—RETURN TO PRISON OF PATIENT IN INSANE HOSPITAL WHO SHOWS NO SYMPTOMS OF INSANITY.

June 16, 1919.

Dr. Arthur P. Herring, Secy.,
State Lunacy Commission,
330 N. Charles Street,
Baltimore, Md.

DEAR DR. HERRING: I have your letter of June 13th, in which you ask what the Lunacy Commission can do in order to return to the Penitentiary a prisoner transferred to the Crownsville State Hospital as an insane patient, but who has shown no mental symptoms since his transfer.

Sec. 44A of Art. 59 of the Code makes provision for the transfer from the Penitentiary to the Insane Hospital, but there is no specific provision for a return. I think, however, your Commission should notify the State Board of Prison Control that the patient is not a proper subject for treatment at the hospital, and that you are ready to return him to the penitentiary. I think, under these circumstances, you will have no difficulty in making the transfer.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

STATE ROADS COMMISSION.

ANNAPOLIS—CLAIBORNE FERRY—ACT OF 1916, CH. 708—RENTING STEAMER.

January 9, 1919.

Hon. Emerson C. Harrington,
Governor of Maryland,
Annapolis, Maryland.

DEAR GOVERNOR HARRINGTON: You asked me a few days ago for my opinion as to whether the Act of 1916, Ch. 708, providing for a ferry between Claiborne and Annapolis, authorized the appropriation made therefor to be used in renting a ferry boat, or only for purchasing one.

The Act authorizes the State Roads Commission "to provide a suitable steamer or steamers," as a connecting link between the state road systems on the Eastern and Western Shores, and it is my opinion that such steamer or steamers can be provided either by renting or by purchasing, as the State Roads Commission may find most practicable.

I have previously given an opinion to the Comptroller that this appropriation did not revert. (2 Attorney General's Opinions 200, Nov. 9, 1917.) This opinion I now reaffirm. The appropriation is still available for the purposes of the Act.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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STATE ROADS COMMISSION—ENCROACHMENTS ON ROAD—ADVERSE POSSESSION AGAINST TURNPIKE COMPANY OR STATE.

April 11, 1919.

Frank H. Zouck, Esq.,
Chairman, State Roads Commission,
Garrett Bldg., Baltimore, Md.

DEAR MR. ZOUCK: I beg to reply to the inquiry you made of me yesterday.

I understand that a resident of Reisterstown owns property there, the title to which binds on the Reisterstown Road, but that the improvements extend beyond the line of the property

and into the bed of the road. This has been the case for a great many years, and you desire to know whether the property owner may have acquired title by adverse possession to that part of the road on which the improvements encroach. Before the improvements were built, I understand, this road was a turnpike road, owned by the Baltimore and Reisterstown Turnpike Company, but several years ago the turnpike was taken over and has since been owned by the State.

It is settled in Maryland that title by adverse possession cannot be acquired to any portion of the bed of a public road or highway, whether owned by the State or by a turnpike company.

Ulman vs. Charles St. Ave. Co., 83 Md. 130, 144;
Patapsco Co. vs. Baltimore, 110 Md. 306, 311;
Baltimore vs. Knell, 111 Md. 583, 599;
Brady vs. Baltimore, 130 Md. 506, 513.

Therefore, if the facts are as I have stated, then the property owner in question can have no title to the portion of the Reisterstown Road upon which his improvements encroached.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

STATE ROADS COMMISSION—PURCHASE OF POCOMOKE RIVER BRIDGE—TOLL CHARGES.

April 3, 1919.

Frank H. Zouck, Esq.,
Chairman, State Roads Commission,
Baltimore, Maryland.

DEAR MR. ZOUCK: I beg to reply to your favor of March 31st.

You say that the State Roads Commission wishes to purchase from the Potomac City Bridge Company the bridge owned by it across the Pocomoke River, connecting Somerset and Worcester Counties, and you ask whether the commission can continue to collect the tolls now being paid to the company, for the use of the bridge, until such time as the commission is ready to remove the bridge.

The tolls in question are provided for by the Act of 1910, Ch. 106, page 1127. Under the Act Somerset County is required to pay the company $500 annually and Worcester County $1,000 annually, in return for which residents of these two counties, and non-resident taxpayers thereof, are entitled to use the bridge free of toll. All other persons are required to pay toll.

The annual payments made by the two counties are really tolls, which the counties pay for their residents and taxpayers, instead of the residents and taxpayers paying the same themselves.

The State Roads Commission is authorized to purchase the bridge under Secs. 35 and 48 of Art. 91 of Bagby's Code. Sec. 35 authorizes the purchase of turnpikes and Sec. 48 the purchase of bridges.

I do not think, however, that the State Roads Commission can charge toll for the use of its bridges and roads. Not only is there no statutory authority for this, but Sec. 35 of Art. 91 of the Code provides that all highways acquired by the Commission "shall be State highways and shall be constructed, improved and maintained by said commission for the State and at its expense."

The instances in which the courts have recognized the commission's right to receive *rent* have all been cases of pre-existing agreements for the *exclusive user* of part of the highway for conduits or like purposes. None of them have been cases in which the commission received payment for the ordinary use of the highway by the public.

Therefore, it is my opinion that if the Pocomoke River Bridge is purchased, the commission will not have the right to require Somerset and Worcester Counties to continue their annual toll payments and to require non-residents of these two counties to continue paying toll.

It is, however, possible that the desired result may be attained through some form of a holding company, or through postponing the time when the title will pass, or perhaps in some other way. I will be very glad to try to work some method out with Mr. Dennis, the company's counsel, and yourself.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

TAXATION.

COLLATERAL INHERITANCE TAX—COLLECTION—PROCEDURE.

March 27, 1919.

Charles N. Dement, Esq.,
Register of Wills,
La Plata, Maryland.

DEAR MR. DEMENT: I beg to reply to your recent favor with reference to the estate of Samuel H. Cox, in which you ask by whom proceedings should be brought for the collection of collateral inheritance taxes and of the State tax on executor's commissions.

With reference to collateral inheritance taxes, the distributees or legatees may be sued, if their interest has been paid to them, and the tax has not been paid.

Fisher, Trustee, vs. State, 106 Md. 104, 120.

Or the executor's letter may be revoked and his bond sued.

Bagby's Code, Art. 81, Sec. 137.

In either case the suit is brought by the State.

With reference to the State tax on executor's commissions, the executor may be sued on his bond.

Bagby's Code, Art. 81, Sec. 117.

This suit should also be brought by the State.

The State's Attorney is the proper party to bring any of the above suits, under Bagby's Code, Art. 10, Sec. 20. The cases would be tried by the State's Attorney in the lower Court and by the Attorney General (associated, of course, with the State's Attorney) in the Court of Appeals. This is the procedure recognized in the Wingert Case, 125 Md. 536; 127 Md. 80; 129 Md. 28, and 131 Md. 243.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

TAXATION—COLLATERIAL INHERITANCE TAX—CONSTRUCTION OF WILLS PROVIDING FOR FORMATION OF A CORPORATION.

April 19, 1919.

Hon. Meyer J. Block,
Chief Judge Orphans' Court,
Court House, Baltimore, Md.

DEAR JUDGE BLOCK: Mr. John Henry Skeen, attorney for the estate of William H. Whiting, deceased, tells me that you asked him to secure my opinion upon the liability to collateral inheritance taxes of certain shares of stock which the will provides are to go to collaterals. The shares of stock in question are in a corporation which the will directs the executors to form. Whether they are taxable or not depends, I think, upon the proper construction of the will. For this reason, it is necessary for me to set out the provisions of the will at some length, and for this reason, also, I mean this opinion to apply only to this particular will, as other wills providing for corporations may be susceptible of a different construction.

Mr. Whiting, at the time of his death, was a member of the firm of William H. Whiting & Company. After making some pecuniary bequests, and also certain bequests to employees, all collaterals, of shares of stock aggregating $7,000 par value in the corporation afterwards mentioned, Mr. Whiting proceeded to dispose of his interest in the firm of William H. Whiting & Company, first saying that "I most earnestly *request the cooperation* of all parties" in the plan laid down by him, which was:

1. If the business was not incorporated before Mr. Whiting's death, then the testator *gave and bequeathed* his interest in the firm, together with certain insurance policies aggregating $35,000, to his wife and daughter, "and I *advise* them to invest" both the proceeds of the policies and the testator's interest in the firm in the shares of stock of a corporation, to be known as the William H. Whiting Company, *"if and when formed,"* for the purpose of taking over the firm business.

2. The testator then *directed* that this corporation should be formed "as soon after my death as possible," and he then laid down the plan of incorporation which he *directed* his executors

to follow. The capitalization was to be $100,000. The testator's partner, a collateral, was to have $10,000 par value of stock, in addition to the shares to which he was entitled for putting in his own interest. $10,000 par value of stock was to be given to Mr. Merryman, an employee of the firm, and also a collateral. The remainder of the stock was to be allotted to the testator's wife and daughter, equally, but subject, presumably, to the specific bequests of stock first above mentioned.

Further, "in consideration of my wife and daughter *relinquishing* the immediate benefit of the above valuable devises and bequests and putting same into the William H. Whiting Company,"—that is, the testator's interest in the firm business and the insurance policies,—the company was to provide, as part of its running expenses, and before the payment of dividends, yearly allowances of $3,000 to the wife and $2,000 to the daughter, for a period of five years.

3. *In case the said corporation was not formed,* "and it becomes necessary to close out my interest in the partnership," then the testator expressed the desire that his interest be sold *by his wife and daughter* to his partner and other business associates, on terms as favorable to the purchasers as possible.

4. The residue of the estate, that is, the portion not taken over by the corporation, if formed, and also, of course, excluding the pecuniary legacies, was left two-thirds to the testator's wife and one-third to his daughter.

The corporation referred to was not formed by the testator during his life, but was formed by the executors after his death, and the wife and daughter are about to invest their interests therein, in accordance with the testator's wishes. In further accordance with the testator's wishes, the shares of stock in this corporation, to the extent of $27,000 par value, will be allotted to collaterals, and the question is whether these shares of stock are subject to collateral inheritance taxes.

Looking at this will as a whole, I think it clearly makes a bequest to the testator's wife and daughter of his interest in the firm and in the insurance policies, which bequest became operative, unconditionally, upon the testator's death.

It is true that the testator earnestly desired the corporation to be formed, and that he *directed* his executors to form it; but

there is no condition attached to the bequest to the wife and daughter that they must invest the same in the shares of stock.

On the contrary, the testator simply *advised* them to do this, after first *requesting* all parties to co-operate. If the wife and daughter follow the testator's advice, then they are to receive annual allowances in consideration of having *relinquished* the immediate benefit of the bequests made to them. But the testator clearly contemplates that they may not follow his advice, but may, on the contrary, decline to invest their interests in the corporation, because, in this event, he desires them to sell his interest in the firm to his partner and associates.

For these reasons, I think that the testator's interest in the firm business and in the insurance policies are bequeathed absolutely to his wife and daughter with no legal obligation, but only a request, to invest the same in the corporation. The property, in other words, passes under the will to the wife and daughter absolutely, and it is for them to decide whether they will afterwards dispose of it, in accordance with the testator's desires or not.

If they do, then they will be disposing of their own property, and if the corporation is formed, and if certain of its shares of stock are allotted to collaterals, in accordance with the testator's wishes, such shares of stock will not pass under the will, but will be allotted to the collaterals as the result of the choice of the wife and daughter to use what is their own property in this particular manner.

It is my opinion, therefore, that the shares of stock in question are not subject to collateral inheritance taxes.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General*

TAXATION—COLLATERAL INHERITANCE TAX—DEED RESERVING LIFE ESTATE IN GRANTOR.

January 9, 1919.

Richard Davis, Esq.,
Register of Wills,
Ellicott City, Md.

DEAR MR. DAVIS: I beg to reply to your recent letter with reference to collateral inheritance tax upon a conveyance made by John T. Streaker to his niece, Lucy Ann Moxley.

The deed conveyed fee simple property to the niece, subject to a life estate reserved by the grantor, Mr. Streaker, in himself. Mr. Streaker is now dead.

An estate of this kind takes effect in possession upon the grantor's death. It is, therefore, an estate transferred by deed "made or intended to take effect in possession after the death of the grantor," and as such is taxable under Bagby's Code, Art. 81, Sec. 120. (See Attorney General's Opinions, Vol. 1, page 259.)

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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TAXATION—COLLATERAL INHERITANCE TAX—ESTATE VALUED MORE THAN $500, DISTRIBUTION LESS THAN $500.

February 24, 1919.

Lawrence B. Towers, Esq.,
Clerk, Circuit Court,
Denton, Maryland.

DEAR MR. TOWERS: I beg to reply to your favor of February 20th, in which you say that the surplus of an estate remaining after a mortgage foreclosure is over $500.00, of which $200 will be consumed in the payment of debts, and $300 will be distributed to collaterals. You ask whether this distributive interest is subject to collateral inheritance tax.

If the testator's whole estate is valued at less than $500.00, then no distributee pays any tax at all. But if the whole estate is valued at more than $500.00, then the tax is imposed upon

what passes to the collaterals, and it makes no difference in such case whether the estates passing to the collaterals, that is, their respective distributive shares, are more or less than $500.00.

Attorney General's Opinions, Vol. 1, page 258.

Therefore, in the case you mention, the distributive shares of the collaterals who receive the $300.00 are subject to the tax.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

TAXATION—COLLATERAL INHERITANCE TAX—IRREVOCABLE DEED OF TRUST RESERVING LIFE ESTATE TO GRANTOR—POWER OF APPORTIONMENT BY WILL.

January 17, 1919.

T. Hughlett Henry, Esq.,
Easton, Maryland.

DEAR MR. HENRY: I beg to reply to your favor of January 11th.

You say that an irrevocable deed of trust conveyed property to you as Trustee, to pay the income to the grantor for life, and then to such persons as might be appointed by the grantor's will. The grantor subsequently died, leaving a will, in which this power of appointment was exercised. You ask my opinion as to whether the property now passing to the appointees is subject to the collateral inheritance tax.

I do not think that it is. Bagby's Code, Art. 81, Sec. 120, imposes this tax upon estates "*passing* from any person who may die seized and *possessed* thereof * * * or transferred by deed, etc., made or intended to take effect *in possession* after the death of the grantor," etc.

In your case, the estate did not pass from any person dying possessed thereof, because both title and possession passed from the grantor to you as Trustee when the deed of trust was executed. Nor was the property transferred by deed intended to take effect in possession after the grantor's death. The deed transferred possession when it was executed. (See de Bearn vs. Winans, 111 Md. 434, 472.)

This conclusion is not inconsistent with my opinion to the Comptroller of March 25, 1916, Attorney General's Opinions, Vol. 1, p. 259, because there the grantor reserved a life estate in herself, and also the power to revoke, and thus she was possessed of the property when she died. The property did not pass into the possession of any one else until the grantor's death. In the present case, however, both title and possession passed irrevocably when the deed of trust was executed.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

Note—See Smith vs. State, Court of Appeals, April Term, 1919.

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TAXATION—COLLATERAL INHERITANCE TAX—PAYABLE UPON INTEREST ON COLLATERAL SHARES DISTRIBUTED.

April 21, 1919.

Charles S. Parran, Esq.,
Register of Wills,
Prince Frederick, Md.

DEAR MR. PARRAN: I have your favor of April 17th, in which you ask my opinion whether collateral inheritance taxes should be imposed upon the entire amount which passes to collaterals, including not only the distributive shares but also interest payable thereon, or whether the taxes should be imposed on the distributive shares only, thus allowing interest to pass free of the tax.

In my opinion, the tax is imposed upon the whole value which passes to the collaterals, at the time they receive it, and this, of course, includes the interest. I think the case of Fisher, Trustee, vs. State, 106 Md. 104, 119-121, leaves no doubt on this point.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General*

TAXATION—COLLATERAL INHERITANCE TAX—STOCK OF NON-RESIDENT SENT HERE TO PAY COSTS.

January 18, 1919.

P. S. Opie, Esq.,
Safe Deposit & Trust Co.,
Baltimore, Maryland.

DEAR MR. OPIE: I received your favor of January 13th.

You say that the Safe Deposit and Trust Company is Ancillary Administrator of the estate of a deceased resident of New Jersey, having been appointed for the purpose of passing title to real estate in Maryland; that the deceased owned some Baltimore City stock, and this stock was sent you by the administrator of the domicile in New Jersey, to be sold for the purpose of paying the expenses of the ancillary administration in Maryland; that the stock was sold, the expenses paid, and the balance of the proceeds are about to be distributed by your company to the New Jersey administrator, who in turn will distribute the same to collaterals; and you ask whether this stock or its proceeds is subject to collateral inheritance tax in Maryland.

Neither the stock nor its proceeds is subject to the tax, because the stock was not property in this State. The fact that the stock was sent here for sale under the circumstances stated, does not make it or the proceeds taxable here.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

TAXATION—COLLATERAL INHERITANCE TAX—STOCK ASSIGNED TO COLLATERALS—INCOME PAYABLE TO ASSIGNOR UNTIL HER DEATH.

May 23, 1919.

Russell P. Smith, Esq.,
Register of Wills,
Cambridge, Maryland.

DEAR MR. SMITH: On April 12th you asked my opinion whether any collateral inheritance tax was due in the case of stock certificates which were assigned to collaterals, with the understanding that the assignor should retain the same, and receive all income therefrom until death, but immediately upon death, the certificates were to belong to the collaterals.

On April 14th I wrote you that the question was involved in the case then before the Court of Appeals. I now beg to advise you that the Court of Appeals has since rendered a decision, holding that property is subject to collateral inheritance tax under the circumstances stated by you. The title of the case is J. Maulsby Smith, et al., Trustees, vs. State of Maryland, April Term, 1919.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS.

CONTRACT FOR PRINTING MARYLAND REPORTS—DISCUSSION OF STATE REPORTER.

W. H. Perkins, Jr., Esq., May 29, 1919.
1010 *Munsey Building,*
Baltimore, Maryland.

DEAR MR. PERKINS: I beg to reply to your favor of May 28th, in which you ask whether the law gives you any discretion in awarding the contract for printing the Maryland Reports, or whether you must award it to the lowest bidder.

Bagby's Code, Art. 80, Sec. 3, which provides for advertising for bids in this case, provides that "the said contract shall be awarded by the reporter to the person whom he shall determine to be the most responsible bidder, who will agree to publish the said report in the manner aforesaid and sell the same on terms most advantageous to the public and at the lowest price."

It is my opinion that under this section the reporter has the discretion to determine which bidder is the most responsible, and who will sell the reports on terms most advantageous to the public, and that the reporter has the right to award the contract to such bidder, even though his bid may not be the lowest.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—ENGINEERS IN NEW ANNEX OF BALTIMORE CITY—ACT 1918, CH. 82.

January 14, 1919.

State Board of Examining Engineers,
Union Trust Building,
Baltimore, Maryland.

GENTLEMEN: I have your letter of January 4th, in which you ask for advice as to your standing with the engineers within the territory annexed to Baltimore City by Chapter 82 of the Acts of 1918.

This territory is now a part of Baltimore City, and the engineers in it are subject to your jurisdiction just as are engineers in Baltimore City proper, to no greater and to no less extent.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—HIGH COST OF LIVING—STATUTE—COMMON LAW.

August 12, 1919.

William H. Killian, Esq.,
Chairman, Committee on Living Costs,
512 Munsey Building, Baltimore, Md.

DEAR MR. KILLIAN: I have made an exhaustive examination of the statutes and common law of Maryland for the purpose of advising you what aid may be obtained therefrom in reducing the high cost of living, and in prosecuting criminally any practises, detrimental to the public, which may be found to exist. I now beg to submit my conclusions to your committee.

STATUTE LAW.

1. *State Board of Agriculture,* Act 1916, Ch. 391. This board is given broad powers to investigate conditions affecting the production and distribution of all kinds of food products. The board has power to investigate "the conditions surrounding the breeding, raising and marketing of live stock, and the products thereof, * * * the raising, distribution and sale of farm, orchard, forest and nursery products, generally, * * * the preparation, manufacture, quality, analysis, inspection, control and distribution of animal and vegetable products." The board is given general control over these and over "all matters in any way affecting or relating to the fostering, protection and development of the agricultural interests of the State." The board is also authorized to issue rules and regulations in respect to these matters, which shall have the force of law, and violations of which are punishable as misdemeanors, and may call upon all sheriffs, constables and police officers to assist in enforcing the same.

I see no reason why this board, under these powers, may not conduct an investigation of alleged marketing agreements, alleged price fixing agreements among wholesalers or retailers for food and food products, and the like; and if it seems wise to make illegal any practices which are detrimental to the public, then the board's power to make rules and regulations, enforceable as law, opens the way for executive action. I think that this board may prove a most valuable aid in your work.

2. *State Board of Labor and Statistics,* Act 1916, Ch. 406. This board has broad powers to investigate factories and workshops, and employers of labor in factories, workshops, stores and mercantile establishments are required to furnish the board *any* information in their possession. Code, Art. 27, Secs. 264. 265, etc. These powers may well be exercised in securing information important to your work.

3. *State Board of Health.* The Act of 1916, Ch. 163, providing for the regulation of cold storage plants, has already been brought to your attention. Briefly, it makes it unlawful to keep food in cold storage for longer than one year, with an extension, if granted, of 160 days, and when food has been held for 30 days, it must, when offered for sale, be marked "Cold Storage Goods," and cannot be returned to storage.

4. *Corporate Monopolies.* Monopolistic contracts made by corporations may be cancelled by appropriate proceedings, and the charters of corporations making them are subject to forfeiture.

5. *Cornering the Market.* The Act of 1917, Ch. 7, makes it a felony to store food for the purpose of cornering the market, increasing the price above the market price or limiting the supply.

Common Law.

I have also made an exhaustive study to see what relief can be secured in Maryland under the common law, independently of the above statutes. This subject I will consider only from its criminal side, because this is the important side now.

The history of the common law on this subject is most interesting. The old English custom of food distribution was that the farmer brought his products to the market on market days,

and sold them to the consumer. Early in the sixteenth century the middleman first appeared. He was believed to perform no serviceable function, was viewed with suspicion and alarm, and in 1552 certain English statutes were passed to put him out of business.

These statutes made criminal the trade practices known as engrossing, forestalling and regrating. Engrossing consisted of buying up food and necessities of life with the intent to resell them. Forestalling consisted of meeting the farmer on his way to market and either buying his wares or inducing him not to bring them to market. Regrating consisted of buying food and necessities of life in one market and selling them in any other market within four miles.

Prosecutions under these statutes were frequent, but by the end of the eighteenth century John Stuart Mills had shown that the middleman performed a real service, and in 1772 some of the statutes above mentioned were repealed. In 1801, however, Lord Kenyon held that engrossing was a common law offense, independently of the statutes of 1552, and that it had not been affected by the repealing statute of 1772. In that case the defendant was convicted of the charge of buying up a considerable proportion of the hops of three counties, thereby materially increasing the price of hops in those counties.

It is clear, therefore, that engrossing, which was the most important of the three offenses mentioned, was a crime under the English common law, and the English common law was, of course, adopted in the main as the law of this State by our Constitution of 1776.

The question, therefore, is, whether this particular common law offense of engrossing was adopted as part of the law of Maryland. This has never been decided by our courts, and I have been unable to find any prosecution in Maryland for engrossing. This does not show that engrossing is not an offense here. It simply means that we must resort to the decisions in other states to form an opinion as to whether it is or not.

In Kentucky and Minnesota it is held that engrossing is no longer an offense. In Rhode Island, however, the courts hold that it is, where a sufficiently large supply of food or necessaries of life are bought up, to prevent general competition and to con-

trol and raise prices; and the United States Supreme Court, in the Standard Oil Case, intimates strongly that it is an offense in this country to buy up the necessaries of life if there is the intent to enhance the price unduly, and thus bring about one of the injuries resulting from monopoly. There are other cases which give force to this.

There is, therefore, ample ground for the view that the old common law offense of engrossing, that is, the buying up of food or other necessaries of life with the intent to resell them, is still an offense in this country, provided it is accompanied with the intent to monopolize, and thereby control or raise prices to the detriment of the public.

This element of monopoly, although not necessary at common law, seems to be necessary in this country, and all of the cases have proceeded on the theory that this means a combination among several persons.

In other words, it is extremely doubtful whether a successful prosecution would lie against a person who singly, and without any agreement or understanding with anyone else, buys up a supply of food or other necessaries and holds them for his own price.

But if two or more individuals combine for the purpose of buying up or holding food or other necessaries, with the intent and effect of restricting free competition, and of controlling and raising prices to the detriment of the public, then the elements of a monopoly exist, and there are strong reasons to believe that our courts would hold this to be a criminal offense in Maryland.

As I have said, the Maryland courts have not yet had this question before them for decision, but if your committee finds any case of the kind I have just referred to, you will be amply justified in presenting it to the Grand Jury for indictment.

Finally, to spread false rumors that there will be a scarcity of a particular product, and consequently a probable increase in price, with intent to secure a present increase in price, was a criminal offense at common law, and there are strong grounds for the belief that the courts would hold this an offense in Maryland.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—HOUSE OF REFORMATION—RIGHT TO WORK BOYS ON NEIGHBORING FARMS.

December 8, 1919.

Joseph J. Janney, Esq., Sec. & Treas.,
House of Reformation for Colored Boys,
Cheltenham, Maryland.

DEAR SIR: Some time ago you asked this Department whether there was any legal objection to placing boys under fifteen years of age, who are inmates of your institution, out to work among farmers.

I can find no provision of law prohibiting such action. On the contrary, the Board of Managers of the House of Reformation seems to have been given express authority to employ minors in employments as may be suited to their years and capacities, under the provisions of Secs. 566 and 567, Art. 27, Vol. 3 of the Annotated Code of Maryland.

Very truly yours,

PHILIP B. PERLMAN, *Asst. Attorney General.*

MISCELLANEOUS—LAND OFFICE—WARRANT TO SURVEY, PRICE—ACT 1918, CH. 151.

January 24, 1919.

Hon. James S. Shepherd,
Commissioner of the Land Office,
Annapolis, Maryland.

MY DEAR SENATOR SHEPHERD: I beg to reply to your favor of December 30th. A number of matters have caused my delay in answering, which I trust you will pardon.

Before 1918, Sec. 35 of Art. 54 of Bagby's Code provided that "every person who has obtained a warrant to survey or escheat land shall within one year from the date of such warrant pay for the vacant land included in the certificate of the survey 50 cents per acre," etc. The Act of 1918, Ch. 151, which took effect June 1, 1918, amended this section so as to make the payment "fifty cents per acre, or such sum per acre as shall be assessed by the Commissioner of the Land Office based

upon, but not exceeding, the value of similar land as assessed by the county or city authorities for land in the vicinity of such vacant land," etc. You ask whether the price is to be computed under this Act of 1918 or under the former law, in cases where the warrant was issued before June 1, 1918, and the certificate of survey filed either before or after that date, but the price not to be paid until after June 1, 1918.

Neither the issue of the warrant nor the return of the survey constitutes a contract between the applicant and the State. In Day vs. Day, 22 Md. 530, 538, it is held that even the payment of composition money constitutes no such contract, and does not bind the State to a transfer of her title. This decision was approved in Barton vs. Swainson, 130 Md. 630, 634.

In Day vs. Day a patent was applied for upon land under navigable water, at a time when the issue of a patent for such land was not forbidden, the warrant was issued, the survey returned and the composition money paid, yet the Court of Appeals held that the Legislature, by subsequent act, could prohibit the issue of patents upon land under navigable water, and that in such event no patent could issue. If the Legislature can thus take away altogether the applicant's right to the land even after he has paid for it, then I see no reason why the Legislature may not, before he has paid for it provide a new method for computing the price.

Moreover, the price fixed by Sec. 35 of Art. 54 of Bagby's Code before the Act of 1918 took effect, could not apply after that Act did take effect, because the Act of 1918 repealed the former law altogether.

It is, therefore, my opinion that in the cases mentioned by you, that is, cases where the price is not to be paid until after June 1, 1918, the price must be fixed in accordance with the Act of 1918, Ch. 151.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—LEASE OF OFFICES BY BOARD OF PUBLIC WORKS.

March 28, 1919.

E. Austin Baughman, Esq.,
Commissioner of Motor Vehicles,
11 *E. Lexington Street,*
Baltimore, Maryland.

DEAR MR. BAUGHMAN: I beg to reply to your favor of March 20th, 1919, in which you ask whether the Board of Public Works has authority to lease the Maryland Historical Society building for a period of ten years, for offices for the Commissioner of Motor Vehicles.

A lease is not invalid because made for a period extending beyond the term of office of the board or official making it (29 L. R. A. (N. S.) 652, 655), and the question is simply one of statutory authority.

The Board of Public Works has power, under the Act of 1912, Ch. 330, to lease "a building or part of a building" in Baltimore City, for State offices, for a term of years not exceeding fifteen, and under the Act of 1918, Ch. 85, Sec. 136, the Commissioner of Motor Vehicles is required to "maintain an office in the City of Baltimore."

There may be some question, under these acts, as to whether the lease should be made by you or by the Board of Public Works, and to avoid this, I think it would be better for both to join. If this is done, and if, in the judgment of the Board and yourself, a ten year's lease is reasonable and necessary, then, in my opinion, such lease will be valid.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—ORPHANS' COURT—JUDGE OF, CANNOT BE MEMBERS OF BOARD OF EDUCATION.

December 20, 1919.

Hon. George W. Rawlings,
Duley, Prince George's County,
Maryland.

DEAR JUDGE RAWLINGS: I have your letter of recent date in which you ask me whether you are eligible to continue as a member of the County Board of Education, you having recently been elected a judge of the Orphans' Court of Prince George's County.

Article 33 of the bill of rights provides that no judge shall hold any other office, civil or military or political trust, or employment of any kind whatsoever under the constitution or laws of this State or of the United States or any of them. I think that a member of the County Board of Education holds a political trust and that, therefore, a judge of the Orphans' Court is disqualified under the above article from continuing as a member of such a board.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—NATIONAL GUARD—STATUS OF MEMBERS.

Hon. Henry M. Warfield, August 21, 1919.
Adjutant General of Maryland,
Maryland Trust Building,
Baltimore, Maryland.

MY DEAR GENERAL WARFIELD: I have your letter of August 7th enclosing an opinion given by Colonel Colston of Kentucky, on the status of the National Guard of that State. In this opinion the Attorney General of Kentucky concurs, and the Governor of Kentucky has followed it by issuing his proclamation.

You ask my views on the subject, in order that you may be properly advised as to the State's attitude towards the old

National Guard, in taking up the organization of the National Guard which you have been called upon to do by the War Department.

It is Colonel Colston's opinion that Sec. 111 of the National Defense Act, providing that all members of the National Guard drafted into the military service of the United States under that section "shall, from the date of their draft stand discharged from the militia" contemplates merely their temporary discharge until such time as the United States releases them from service. At such time he considers that the State can hold in a National Guard all officers and possibly all enlisted men who were drafted, and whose terms of office or service as prescribed by the State laws have not expired. He recommends, as a matter of policy, however, that the State does not attempt to hold any man or officer against his will.

Colonel Colston's opinion has a great deal of force, and is probably correct, although the point, which has never arisen before, is not free from doubt.

It hardly seems to me necessary, however, to decide the legal question, because the Governor and Attorney General of Kentucky seem to me entirely right in their conclusion that even if Colonel Colston is correct in his opinion that the members of the National Guard can, under the circumstances, still be held, it would be most unwise, as a matter of State policy, to attempt to hold these men against their wishes, even if this can be done legally, and if you and Governor Harrington concur in this, then it is unnecessary to decide the purely legal question. It seems to me that the men in question should be dealt with as they are in Kentucky, namely, they should be given the opportunity to enlist in the new National Guard, but should only be actually enlisted therein in case they signify their willingness to do so.

I return Colonel Colston's opinion and the Proclamation of the Governor of Kentucky.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—NOTARIES PUBLIC—NUMBER OF BLANKS TO BE PUBLISHED.

July 26, 1919.

Hon. Hugh A. McMullen,
Comptroller,
Annapolis, Md.

DEAR SIR: I have your letter of July 23, in which you ask whether a Notary Public who was a resident of Baltimore County at the time of his appointment, but who became a resident of Baltimore City by virtue of the Annexation Act, is entitled to the number of Protest Blanks allowed the notaries of Baltimore City, or whether he is only entitled to the lesser number of such blanks allowed notaries from the counties.

Under the provision of the Annexation Act (Ch. 82, Acts of 1918, Sec. 18), every person holding any State or County office who was a resident within the territory annexed to Baltimore City at the time of the passage of the Act, continues to hold such office until the termination of his then pending term as if the Act had not been passed.

In view of this clause, it seems clear that the notary about whom you write is, for this purpose, to be treated as a notary from Baltimore County. I am, however, unable to find any provision of law limiting the number of blanks notaries are entitled to receive, and it seems to me, therefore, that the whole matter is an administrative one, to be determined by your office.

Yours very truly,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—PAROLED PRISONERS—FAILURE TO MAKE LAST REPORT—ARREST FOR VIOLATION OF PAROLE.

February 17, 1919.

Harry S. Hartman, Esq.,
Secy., Advisory Board of Parole,
Brown Arcade Bldg., Baltimore, Md.

DEAR MR. HARTMAN: I beg to reply to your favor of February 10.

You say that when prisoners are paroled you require monthly reports from them during the period of their parole, and that the last report is due on the day the parole expires, which is also the expiration of the term for which they were sentenced; and you ask whether you can arrest, as parole violators, those who do not submit this last report.

Failure to submit this last report is, of course, a violation of one of the conditions of the parole, and under Sec. 7E of Art. 41 of Bagby's Code the paroled person may be arrested, as a parole violator, and required to serve the unserved portion of his sentence.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

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MISCELLANEOUS—POLICE MAGISTRATES IN FREDERICK CITY—COSTS.

April 5, 1919.

E. Austin Baughman, Esq.,
Commissioner of Motor Vehicles,
11 E. Lexington St.,
Baltimore, Md.

DEAR MR. BAUGHMAN: I beg to reply to your favor of March 20th, in which you ask whether the police magistrates in Frederick City should try automobile cases without charging any costs, in view of the fact that they receive salaries for their services instead of fees.

The local laws governing the jurisdiction of these magistrates are the Act of 1908, Ch. 537, p. 785, and the Act of 1908, Ch.

359, p. 793, the latter having been amended by the Act of 1916, Ch. 191. This legislation provides annual salaries for the magistrates, and they "shall receive no other or further fees for any services rendered by them in criminal cases," but nothing is said with regard to costs.

In my opinion to you of June 26, 1916 (Attorney General's Opinion, Vol. 1, p. 227), after enumerating the costs chargeable in automobile cases, I said that "the amount of costs as aforesaid is not affected by the fact that the justice may be paid a fixed salary in lieu of fees."

I think it clear that the police magistrates in Frederick City should impose the costs provided by the motor vehicle law, and should account for the same to the Clerk of the Circuit Court, in accordance with Sec. 289A of the Act of 1916, Ch. 191.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—RIGHT TO CONFISCATE PERSONAL PROPERTY OF ESCAPED PRISONERS.

December 8, 1919.

Robert D. Case, Esq., Secy.,
State Board of Prison Control,
Union Trust Building,
City.

MY DEAR MR. CASE: You ask whether your Board is authorized by law to pass a rule confiscating the personal property of escaped prisoners for the purpose of creating a fund from which to pay rewards for those who are recaptured. Of course, this question relates only to such property of escaped prisoners which is left at the House of Correction or the Maryland Penitentiary.

I think that the Board was given this authority under the provisions of Secs. 636 and 640 of Art. 27, Vol. 4 of the Annotated Code of Maryland, Ch. 556 of the Acts of 1916.

Section 636 provides that:

> "The said board shall have full power and authority to make, repeal, alter or amend such rules and regulations, not inconsistent with law, for the maintenance, discipline

and conduct of institutions, prisoners, officials and employes, by this sub-title placed under its supervision and control, as may be necessary and convenient for the proper administration of the power, authority and discretion, conferred upon it by this sub-title."

Section 640 provides that:

"The State Board of Prison Control shall prescribe the character of punishments for violation of prison discipline in the said institutions, etc."

Very truly yours,

PHILIP B. PERLMAN, *Asst. Attorney General.*

MISCELLANEOUS—STATE BANKING LAW—BRITISH IMPERIAL OR COLONIAL BANKS.

Hon. Gilbert Fraser,
Macht Building,
11 *E. Fayette St.,*
Baltimore.

March 10, 1919.

DEAR SIR: I have your favor of March 5th, asking whether British Imperial or Colonial banking institutions are permitted to do business in Maryland as Federal and State Banks are.

While there is no express prohibition in the Maryland law against foreign banks doing business in this State, yet the examinations which the Bank Commissioner must make of the affairs of State banks which do business here are such as to make it quite clear that only Maryland corporations can conduct the State banking business in Maryland. This has always been the construction of the Bank Commissioner, and it applies, of course, not only to banks of foreign countries, but to banks of other States of this country as well.

It is possible that the Federal Reserve Act or the National Banking Act may contain some prohibition on the subject, but as those are Federal laws, I can, as to them, only refer you to the Federal authorities. My province has only to do with State laws affecting State banks.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

MISCELLANEOUS—WORKMEN'S COMPENSATION—TERMINATION AT DEATH OF MINOR'S CHILD AND REMARRIAGE OF WIDOW.

May 2, 1919.

Charles D. Wagaman, Esq.,
Chairman, State Industrial Accident Commission,
Equitable Building,
Baltimore, Md.

MY DEAR MR. WAGAMAN: I have your recent letter in which you request me to construe Sec. 43 of Art. 101 of the Annotated Code in connection with the following facts:

Your Commission, on March 8, 1919, ordered weekly compensation for three hundred and thirty-eight and one-ninth weeks to be paid by the State Accident Fund, insurer, and the Piedmont & George's Creek Coal Company, employer, to Mrs. Josephine Giggndelle, widow of Nick Giggndelle, $9.00 being for the use of the widow, and $3.57 for the use of the child. The child died on October 20th, 1918, and thereafter on December 11th, 1918, the widow remarried. The State Accident Fund has now asked to have the order modified so that compensation may be terminated as of the date of the death of the child, and of the remarriage of the widow respectively.

Section 43 provides in part: "In case of the remarriage of a dependent widow of a deceased employee without dependent children, all compensation under this article shall cease." You ask whether the words "without dependent children" refer to the date of the death of the employee or the date of the remarriage of the widow.

The phraseology of the Workmen's Compensation Act as set forth in Article 101 is not of the best. The structure of the sentence quoted would permit either construction to be placed upon it. It seems unlikely, however, that the Legislature would compel the payment of an award to the widow after she remarried when there were no dependent children at the time of such remarriage. The reason for such payment has ended, and it seems to me that the payments should terminate when the reason for making them ceases to exist.

I therefore advise you that in my opinion a dependent widow who remarries, and at the time of such remarriage has no de-

pendent children, forfeits all right to further compensation upon such remarriage.

Very truly yours,

ALBERT C. RITCHIE, *Attorney General.*

Note.—In connection with the above opinion see "cases pending in lower Courts—Josephine Giggndelle vs. State Accident Fund, Circuit Court for Allegany County."

OPINIONS

— IN —

UNAPPEALED CASES

— IN —

NISI PRIUS COURTS.

NISI PRIUS DECISIONS NOT APPEALED.

There are hereto appended opinions in seven important cases which were tried during my term as Attorney General. These opinions were rendered in the lower courts, and the cases were either not susceptible of appeal or for some reason were not appealed. The opinions attached, therefore, stand as the only rulings of the Maryland courts on the subjects discussed. The points considered have not been passed upon by the Court of Appeals, and as the opinions in our *nisi prius* courts are not reported, I have concluded to add these to this report in order to have a permanent record of them.

SUPERIOR COURT OF BALTIMORE CITY.
(Filed April 2, 1918.)

ANTHONY PESSAGNO

vs.

WILLIAM PEPPER CONSTABLE, GEORGE L. RADCLIFFE AND DR. GEORGE HELLER, CONSTITUTING THE BOARD OF LIQUOR LICENSE COMMISSIONERS FOR BALTIMORE CITY.

(Writ of Certiorari from the Board of Liquor License Commissioners for Baltimore City.)

John L. Sanford and *W. Purnell Hall,* for Petitioner.

Ogle Marbury, Assistant Attorney General, for the Board of Liquor License Commissioners.

George Weems Williams for William Pepper Constable, individually.

HEUISLER, J.—

On February 19, 1918, a petition was filed by the above-named Anthony Pessagno asking that the Court issue its writ of *certiorari* directed to the Board of Liquor License Commissioners and commanding it to transmit to the Court all the

papers and proceedings in said petition set out and stated, in order that the regularity of the proceedings of said board in the said proceedings might be inquired into; and that such other and further relief might he had for the petitioner as his case might require. On the same day the Court ordered that the writ issue as prayed, and pursuant to said order and on March 1st, 1918, return was made by the said board, and the papers and proceedings were then duly filed in this Court. On March 1, 1918, a motion to quash the said writ was filed by the defendant, the Board of Liquor License Commissioners; and at the same time another motion to quash the writ was filed, individually, by William Pepper Constable; the reasons assigned in both motions being the same. On March 7, 1918, a motion of *ne recipiatur* as to the above-recited individual motion of William Pepper Constable and a request that same be stricken from the files, was filed by the petitioner upon the allegation that there was no sanction in law for such a motion. The motion of the board was filed by the Attorney General of Maryland and his assistant; the individual motion of Constable was filed by other counsel representing him, and it was urged that the appearance in this proceeding of counsel other than the Attorney General or his assistants, was violative of the provisions of the Acts of Assembly of Maryland of 1916, Ch. 560, Secs. 2 and 3, and it was further urged that no individual member of the board was legally entitled to file an individual motion. 2 Poe Pleading and Practice, Sec. 730, at folio 829, says: "Usually the party injuriously affected by the removal of the record under the *certiorari* raises the question by a motion to quash the writ." An inspection of the record justifies the conclusion that the motion of *ne recipiatur* and to strike from the files the individual motion of William Pepper Constable, for the reasons stated, cannot be entertained, and said motion is accordingly overruled.

The record in this case is exceedingly voluminous and much time was necessary for the critical and detailed examination which it has had.

Pessagno, in his petition for the writ, alleges: "That he is entitled by law to specific, definite and certain charges," and that those as filed are not such as he should be required to answer; and that by forcing him to stand trial he is "being

deprived of his constitutional rights in that he is being deprived of his property without due process of law." That he is entitled to a fair and impartial hearing; that William Pepper Constable, the president of the board, has undertaken to act as (*a*) detective in said case (he, Constable, admitting that he directed efforts to get testimony); (*b*) prosecuting witness in said case; (*c*) witness in said case (in that he stated "I am the last witness in the case in presenting the testimony *in support of the charges*"); (*d*) prosecuting attorney in said case (especially his statement, "No power in Baltimore has been able to get testimony on Pessagno's place. There have been communications to the Police Department and reports have come back; 'Not able to get him; no information against him.' I made up my mind to see if I could not find out something"); (*e*) judge in said case (in that after testifying he returned to his seat to sit in final judgment on the hearing).

Summarized, the claims of the petitioner are:

(*a*) That he is entitled to specific, definite and certain charges.

(*b*) That is he deprived of constitutional rights in being deprived of his property without due process of law.

(*c*) That he is entitled to a fair and impartial hearing.

(*d*) That he is prejudiced by the illegal and improper activities of an individual member of the Liquor License Board.

Before proceeding to a further examination of these claims, it should be stated that the object of the writ of *certiorari* and the extent of this Court's jurisdiction in the premises is thus set out in the case of Riggs vs. Green, 118 Md. 226: "The office of the writ is two-fold—first to test the jurisdiction of the inferior tribunal; secondly, to require it to adopt a legal and regular course of procedure in the conduct of the judicial proceeding in which it may be engaged, *i. e., to follow the form of procedure legally applicable to the case.* In either case the general rule is that the Court from which the *certiorari* issues, in reviewing the proceedings of the inferior tribunal does not try the merits of the case, unless authorized by statute to do so, but confines itself to determining whether the inferior tribunal has jurisdiction, and has adopted and followed the regular or legal procedure. Mr. Poe, in his work on Pleading and Prac-

tice, 2nd Vol., Sec. 724, states: "That the object of the writ is not to authorize the Court issuing it to take cognizance of the case and to decide it on its merits, but simply *to enquire whether the inferior Court is proceeding within the just limits of its authority and jurisdiction.*" And in Corpus Juris, Vol. 11, folio 199, it is said: "Except where otherwise prescribed by statute or authorized by practice, *it is the general rule* that in ascertaining whether or not the inferior Court or tribunal had jurisdiction and proceeded regularly in making the determination complained of, the reviewing Court is confined to the consideration of the Record, returned in obedience to the writ, by which the error, if any, must appear."

Fundamentally, then, it is the duty of this Court to enquire whether the inferior tribunal is proceeding within the just limits of its authority and jurisdiction, and to pursue that enquiry in the consideration of the record.

The record in this case shows that it is an incomplete and suspended proceeding begun *for the purpose of hearing charges* made against Pessagno, *touching the revocation* of a license to sell intoxicating liquors or spirituous or fermented liquors, already issued by the board to Pessagno. Examining the law creating the Board of Liquor License Commissioners of Baltimore City, at Sec. 676 of 1890, Ch. 343, we find, *inter alia,* the following words: *"if sufficient cause shall at any time be shown or proof be made to the said board that the party licensed was guilty of any fraud in procuring such license or has violated any law of the State relating to the sale of intoxicating liquor the said board shall, after giving notice to the person so licensed, revoke said license";* and further on, at Sec. 685 of 1890, Ch. 343, we find, *inter alia,* the following: *"The license of any person who permits minors to frequent or loiter around his place, or disreputable or disorderly persons to make it a customary place of visitation or resort may be at any time,* upon proof, *revoked by the Criminal Court of Baltimore City* or *by said board."*

These two sections constitute the authority and jurisdiction conferred by law upon the board touching the matter of revocation of license.

It appears from the record that the following charges were preferred against the petitioner, Anthony Pessagno:

1. For allowing, suffering or permitting disreputable or disorderly persons to make the licensed premises a customary place of visitation or resort.

2. For allowing, suffering or permitting minors to frequent or loiter around the licensed premises.

3. For fraud in procuring his license.

4. For false statements made under oath in his petition applying for a license, in that he sold or allowed to be sold liquor to minors or allowed minors to drink in said licensed house or on said licensed premises.

5. For a false statement made under oath in his petition applying for a license, in that he has kept or permitted to be kept a bawdy house in said licensed house or on the said licensed premises.

6. For a false statement made under oath in his petition applying for a license, in that he has allowed, suffered or permitted in the gathering together or the visitation to the said licensed house or on said licensed premises of women for lewd or immoral purposes.

It appears from the record that Pessagno had notice of these charges, and also that a hearing was in progress and that testimony had been submitted touching the same.

It is objected in the petition for the writ—

"(*a*) That he is entitled to specific, definite and certain charges," and, granting that contention, it is clear that the charges as set out are specific, definite and certain, phrased indeed at times in the very verbiage of the law itself, and it followed "by proof" or if held to be "sufficient cause," as by the law provided, this record of the proceedings as to the charges shows the board to be within the just limits of its authority and jurisdiction.

It is further urged by the petitioner that—

"6. He is deprived of constitutional rights in being deprived of his property without due process of law."

This contention is legally erroneous, and the error is in the failure to distinguish between the ownership and property in spirits and distilled liquors, *the thing itself,* and the right to

use them as such property. "Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts." Leisy vs. Harden, 135 U. S. 110. And Chief Justice Taney, in the "License Cases," 5 How. 557, says: "Spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are, therefore, subjects of exchange, barter and traffic, like any other commodity in which a right of property exists * * * and inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction;" but, "upon the article after it has passed the line of foreign commerce and become a part of the general mass of property in the State," then "the retail or domestic traffic within their respective borders, becomes and is altogether subject to the State laws." "These laws," the Chief Justice, continuing, says, "may indeed discourage imports and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, not to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation or diminish the profits of the importer or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating or restraining the traffic or from prohibiting it altogether if it thinks proper." "The right to sell intoxicating liquors is not a privilege of a citizen of the State or a citizen of the United States; it is a business intended with danger to the community and may be entirely prohibited or permitted under such regulations as will limit to the utmost evils, and the manner and extent of such regulation rests wholly in the discretion of the legislature," is the *nisi-prius* pronouncement of Dennis, J., in the case of Margaret Childs vs. Levi S. White et al., reported in The Daily Record of December 16.

1890, a short time after the passage of the law now under examination, and that learned judge in the course of his opinion, referring to the case of Tragesser vs. Gray, 73 Md. 250, quotes from the opinion of Bryan, J., in that case as follows: "Their power over the whole subject under the Constitution cannot be questioned. They may prohibit the sale of spirituous liquors entirely if they see fit to do so; or they may restrict it in any manner which their discretion may dictate. No one can claim as a right the power to sell either at any time, at any place or in any quantity. If he is allowed to sell liquor under any circumstances it is simply by the free permission of the legislature and upon such terms as it may see fit to impose."

In the case of Metropolitan Board of Excise vs. Barrie, reported in 34 New York, at folio 657, it was held that licenses to sell liquors are not contracts between the State and the persons licensed, giving the latter vested rights protected by the Constitution; nor are they property in any legal or constitutional sense; they have neither the qualities of a contract nor of property, but are merely temporary permits to do what would otherwise be an offense against the general law."

The conclusion of the Court in the case now under consideration is that the license to sell liquor heretofore issued to the petitioner, Pessagno, is only a mere permit, granted in the exercise of the general police powers of the State to carry on an occupation under such regulations and subject to the revocation in such manner as the power granting the same may see fit, by legislative enactment, to provide.

So long as the proceeding for such granting, refusing or revocation conforms to legislative requirements, it cannot properly be questioned in any tribunal as a violation of constitutional rights.

The record shows that the proceedings do conform to legislative requirements, and because of the entire absence in this case of the constitutional rights asserted in the petition, the claim of the petitioner in that respect will be denied.

The claim that the "Board of Liquor License Commissioners of Baltimore City" is by the verbiage and true meaning of the legislative enactment made a judicial body; and that by reason of the "illegal and improper activities of an individual member

of the said board" (as set out in the record) the said member is legally disqualified from further participation in the hearing now in progress, seems to be the main grievance of the petition. That claim, more briefly stated, is this: The president of the board is disqualified to further sit in this hearing because of his activities, prejudgments and prejudices apparent from the record, and if he continues to sit with the board in further hearing, the action of the board, when reached, will be null and void.

This claim is made by reason of the following section of Article 4 of the Constitution of Maryland:

"SEC. 7. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degrees as now are or may hereafter be prescribed by law, or where he shall have been of counsel in the case."

The disqualification of Constable, under this section, is urged because (as shown by the record) *he is interested in the case,* and has acted practically as prosecuting counsel in the case, and had been theretofore *"of counsel in the case."*

The record shows that Constable himself had drawn the complaint and prepared the charges upon which the hearing was proceeding; that he had gathered information by a personal visit to the licensed premises; that he had made up his mind to see if he could not find out something, and that he had, as a witness, detailed before the board the said personal information.

This alleged disqualification depends upon one finding, and that is, what is this Board of Liquor License Commissioners of Baltimore City? Is it a *judicial tribunal* or an *administrative board* to carry out the provisions of the liquor license law according to the intention of the legislature?

"Judicial power is the authority vested in some court, officer or person, to hear and determine when the rights of persons or property or the propriety of doing an act are the subject-matter of adjudication. Official action the result of judgment or discretion is a judicial act. The duty is ministerial when the law exacting the discharge prescribes and defines the time, mode and occasion of its performance, with such certainty that noth-

ing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act." Grider vs. Tally, 77 Ala. 422 (1884).

Apply the verbiage of our statute to this pronouncement: Sec. 676, *inter alia,* "if sufficient cause shall at any time he shown or proof be made to the said board that the party licensed was guilty of any fraud in procuring such license or has violated any law of the State relating to the sale of intoxicating liquor *the said board shall,* after giving notice to the person so licensed, *revoke said license*"; Sec. 685, *inter alia,* "the license of any person who permits minors to frequent or loiter about his place, or disreputable or disorderly persons to make it a customary place of visitation or resort, may be at any time *upon proof* revoked by * * * said board."

The "official action" of the board, under Sec. 676, *i. e.,* the revocation of the license for "violation of any law of the State relating to the sale of intoxicating liquors," and those general laws forbid the specific offenses set out in Sec. 685, *is mandatory* and requires the performance of a certain and specific duty arising from fixed and designated facts, *and is a ministerial act only.*

In construing a similar statute in Missouri, the Court in the case of State vs. Ross, 177 Mo. App. 231, said: "Much must be and should be left to the good sense and discretion of the county Court, whose position makes it the proper tribunal to deal with such matters. It determines the unfitness of a man to further hold the license, if running a disorderly house, much in the same way as it determines his fitness as a lawabiding citizen to have the license in the first instance. The law on this point is well stated and supported by the authorities cited in State vs. Dykeman, 153 Mo. App. 416, as follows: No form of procedure is provided except that five days' notice of the hearing must be given the accused. In the hearing the county Court merely conducts an investigation for the purpose of satisfying their own judgment as to whether or not the licensee has kept a disorderly house *and is in no sense conducting a judicial trial.* The proceedings, therefore, are not required to be as

formal and exact as would be the case in a *trial involving* interference with *life, liberty or property.*"

It should be noted that the county Court referred to in this case, and to which by the Missouri State the revocation of liquor licenses was committed, was intrinsically a "judicial tribunal" and notwithstanding it was held by the Court dealing with the writ that the county Court was not bound, in this particular character of hearing by its ordinary rules of procedure, the purpose of that proceeding not being to determine and adjudicate property or personal rights, but merely to satisfy the judgment of the Court as to whether the licensee had conducted a disorderly house and should for that reason have his license revoked.

The case of Baldacchi vs. Goodlet, notary public, and W. P. Lane, Comptroller, 145 Southwestern Rep. 329 (Court of Appeals of Texas), is illustrative of this examination and the administrative official therein referred to had gone to much further lengths than is disclosed by the record in this case. This was a suit for an injunction by the appellants, who were retail liquor dealers, to restrain the comptroller from an attempted forfeiture of their license, because he was acting in a judicial capacity as such comptroller, and was disqualified from proceeding for the revocation of the liquor license *because he had expressed an opinion by publicly declaring that on the receipt of depositions to be taken he would forfeit the license.*

The Court held that he was acting only in an administrative capacity and that he was not disqualified from proceeding for the revocation of the license and discussing the Texas statute which is very similar to the one in force locally, said, "the proceeding being ministerial there is no adjudication of the guilt or innocence of a liquor dealer in any judicial sense. The inquiry by the comptroller into the charge made against the liquor dealer is only for the purpose of determining whether he is authorized to perform the ministerial act of revoking the license, and the question of the guilt or innocence of the dealer is only incidental to the facts which authorize revocation. This inquiry is not made without notice to the dealer, and opportunity to him to offer evidence in his own behalf. *The proceeding not being judicial, no rules of procedure are required to be provided, such as are necessary in judicial investigation.* The

Court, continuing, says "the only remaining question is the contention that the injunction should have been granted because the evidence shows that the comptroller was disqualified from passing upon the evidence and determining whether appellants' licenses should be revoked, * * * it was shown that the comptroller had been very active and earnest in his efforts to discover whether there had been violation of the liquor law by the Galveston saloon men. That upon receiving reports from his employes whom he had sent to Galveston for the purpose of ascertaining whether there had been such violation of the law, he had publicly expressed the opinion that there had been such violation, and his determination to revoke the licenses of such violators as soon as he could obtain the necessary legal evidence of such violations. He admitted, upon the stand, that he believed the statements made to him by his employes, but he testified that, notwithstanding this, he could and would decide the question of whether the licenses should be revoked according to the preponderance of the credible testimony adduced upon the hearing. We know of no rule by which an administrative officer is disqualified from passing on facts which authorize him to perform a ministerial duty, because of his having expressed an opinion upon such facts before he is called to act upon them. Public expression of this kind on the part of such officer is a matter of taste and temperament, and while there might be a question of propriety involved, there is no question of legal disqualification." * * * "With the expediency or wisdom of a legislative act the courts have no concern. So long as no constitutional right of the citizen is invaded, the rights and powers of the legislature to enact such laws as they deem best for the public welfare cannot be questioned."

"The legislature and the agencies employed in the enactment of laws are independent of judicial interference; and the courts will not review acts which are legislative."

Miller vs. Jones, 80 Ala. 94; Baur vs. Town Council, 99 Atlantic Rep. 11; People vs. Houghton, 41 Hun. (N. Y.) 560; Appeal of Thomas, 169 Pa. State 111; United States vs. Douglass, 19 D. C. 99.

The law of the above cases is thus summarized in the "Douglass" case, 19 Dist. of Columbia, 99: "The interests and wants

of the public and not any pre-existing right of the petitioner were the subjects they were charged to ascertain. Their mode of enquiry and satisfying their own judgment were not subject to the rules which apply to the ascertainment of disputed private rights. As no mode of inquiry is prescribed by the statute the commissioners are, by implication, authorized to adopt any that may reasonably be used in attaining the end in view."

The legal doctrine announced in these cases rests upon the conclusion that all manner of persons and courts and boards therein considered charged with the supervision and administration of liquor license statutes are administrative agencies solely and not judicial tribunals, and their application to the statute under consideration would fail in force, if any doubt remained as to the statutory character of the board considered in relation to the provisions of Sec. 7 of Art. 4 of the Constitution of Maryland. This Court is satisfied that in the purposes and provisions of the statute itself there can be found but one meaning of the legislative mind; and that was an intention to have the legislative power of control over the serious question of liquor license, so peculiar in its character and so distinctive and dangerous in all the features of its traffic, entrusted to the Board of Liquor License Commissioners of Baltimore City as the administrative agent of the legislature, and it was not its purpose to circumscribe that administrative agent with the strict and formal rules of judicial proceeding and subject its proceedings to the machinery of the courts of justice. "This," as urged by the counsel of the board, "would frustrate and nullify the fundamental purpose and intention of the legislature in creating the board and vesting in them the powers which the law defines." *The disqualification provided for by the Constitution of Maryland* (Const. Art. 4, Sec. 7) *refers only to judges of courts of record or courts of law;" and a judge is not disqualified merely because he has expressed his opinion as to the case."*

County Comm'rs. vs. Wilmer, 101 Atlantic Rep. (Md.), 686.

Both, or either of these pronouncements of the Court of Appeals of Maryland, made on June 27, 1917, must finally dispose of the petitioner's contention as hereinbefore set out, "that he

is prejudiced by the *illegal* and improper activities of an individual member of the Liquor License Board."

The remaining contention of the petitioner, "that he is entitled to a fair and impartial hearing," seems to be a "begging of the question" and cannot prevail, for the record shows that the hearing has not been concluded; that, although entitled to do so, petitioner has offered no evidence in his own behalf touching the matter of the charges made against him, and no conclusion has been reached by the board in the matter.

For the reasons and conclusions hereinbefore set out the Court is now of opinion that there was no just ground for the issuance of the writ in this case, and an order will be signed quashing the said writ and directing the cause to be remanded to the Board of Liquor License Commissioners of Baltimore City, to be there proceeded with according to law; the costs of this proceeding to be paid by the petitioner, Anthony Pessagno.

BALTIMORE CITY COURT.

(Filed May 28, 1918.)

LEWIS J. SELZNICK

vs.

CHARLES E. HARPER ET AL.

(*Appeal From the Ruling of the Board of Censors in the Matter of the Photoplay "War Brides."*)

Sylvan Hayes Lauchheimer and *Morris Wolf*, for appellant.

Albert C. Ritchie, Attorney General, and *Philip B. Perlman, Assistant Attorney General*, for appellees.

DUFFY, J.—

The authority of the Board of Censors depends upon the construction of Section 6 of the Statute, which reads as follows:

"Sec. 6. The Board shall examine or supervise the examination of all films, reels or views to be exhibited in the State of

Maryland, and shall approve such films, reels or views which are *moral* and *proper,* and *shall disapprove* such as are *sacrilegious, obscene, indecent* or *immoral,* or such as tend, in the judgment of the Board, to *debase or corrupt morals.*"

This statute was passed in the exercise of the police power, and should be given a liberal construction in order that the public good may be accomplished which was intended by the Legislature. It calls for the exercise of judgment and discretion on the part of the Board in approving and disapproving films submitted to it. On appeal from their decision, the Court's opinion and judgment cannot be substituted for that of the Board. The Board's finding can be overruled only when it is arbitrary, capricious or oppressive. If the question be doubtful and there is room for honest difference of opinion, and the determination of the question requires judgment and discretion, the Board's action will be conclusive on the Court. 166 N. Y. S. 343, Message Play Co. vs. Bell; 131 Minn. 197, Bainbridge vs. Minneapolis.

If the construction put by appellant's counsel upon the section of the statute above quoted be correct, the Board's authority is limited to cases where the film is obscene, sacrilegious or lewd.

In the New York statute the words morality, decency and public welfare are associated in describing the censor's authority. To limit the meaning of the words "moral" and "proper" in our statute, applying them only to *personal* morality and not to the general welfare of the community is to emasculate the statute.

The definition of "Immoral" in 21 Cyc. 1736, is: "Hostile to the welfare of the general public." It seems reasonable to define this word as broadly in a statute such as this.

It is clear that a film comes within its inhibition if its subject-matter directly or indirectly suggests the violation of a penal statute, and in this view I am supported by the New York Court in the case of the Message Play Co. vs. Bell, 166 N. Y. Sup. 339.

This photoplay does, I think, give a plain suggestion to those desiring to oppose the prosecution of the war and conscription and to promote pacifism.

Let us suppose (in the photoplay) the President is to pass through Baltimore in an automobile, and that Joan is the widow of one of our soldiers who has been killed in France, and that she arouses a host of other women who have suffered like misfortune, or who fear they will, or whose husbands and relatives are about to be called to the colors, and that a great throng of them fill the street, stop the President, and that Joan makes an impassioned appeal to him to stop the war. The President says this can not and must not be done; whereupon Joan draws a revolver and shoots herself, that she may not become the mother of another soldier, and then her body is held aloft by the multitude before the President to emphasize the appeal. Could it not be correctly said that Joan "obstructed the recruiting and enlisting service of the United States"—to borrow the language of the indictment against Rose Pastor Stokes? With the President substituted for the King, this is the climax of the photoplay.

It is true that this suggestion is glossed over by some of the explanatory statements which are thrown upon the screen from time to time, but nevertheless the suggestion is there for the person in the state of mind to take it.

The Board of Censors has a very difficult task in determining whether or not a play comes within the purview of the statute, and so has the Court in considering the Board's ruling, on appeal.

The question of the morality or propriety of a picture or a writing is one on which people differ very widely. "The Birth of a Nation" was produced here, but was barred in Minneapolis, and so the fact that the "War Brides" is permitted in many other cities is not a convincing reason for permitting it here. The decision of a question as to whether a play is moral or immoral is not a judicial question at all, nor is it a legal question. For this reason when a judicial officer sits on appeal from a Board duly entrusted with the duty of determining a question such as this, he must feel great hesitancy in adjudicating that the Board has committed an error.

I should hesitate to declare "War Brides" immoral in the narrower sense—it is not obscene or lewd or salacious. I do not think it tends to the degeneracy of the moral sense of the public,

yet I am strongly of the opinion that the finding of the Board that this play is immoral is not arbitrary, and should be sustained.

On this point a consideration of the opinion of the Court in Message Photo-Play Co. vs. Dell, above referred to, will be found useful. There the Court was called on to review the finding of the New York License Commissioner on a photoplay called "Birth Control." The Commissioner declared it to be immoral, indecent and directly contrary to the public welfare. From reading the Court's opinion I should say it was no more lewd or salacious than "War Brides," but the Court refused to set aside the finding of the Commissioner, saying:

"I am of the opinion that it has not been shown that the threatened action of the Commissioner will, if consummated, constitute an abuse of the discretion vested in him, or that it will be capricious and arbitrary or founded upon erroneous information, or that he has not reasonable ground to apprehend that public morality or decency, or the public welfare, will be endangered by the presentation of this motion picture film."

The appeal in this case will be dismissed, with costs to the appellee.

CIRCUIT COURT FOR ALLEGANY COUNTY.

(April Term, 1918—Filed August 5, 1918.)

VINCENZO IMBROGNIO

vs.

STATE INDUSTRIAL ACCIDENT COMMISSION ET AL.

Walter C. Copper and *J. Philip Roman,* for appellant.

Philip B. Perlman, Assistant Attorney General, for appellees.

HENDERSON, J.—

This is an appeal from a decision of the State Industrial Accident Commission, denying its jurisdiction and dismissing the petitioner's claim for compensation. The facts are extremely

simple. The boy for whose death the claim was made was under 14 years of age at the time of the accident, but held a permit from the proper authority dated November 23, 1917, to work as a laborer in the brick yard of the defendant, which permit gave his age as 14 years on November 16, 1917. He had been employed, however, without the permit and had worked in September, 1917, and he had been working about the machine on which he was killed, although it may be that his duty did not require him to work on it.

There are but two questions in the case:

(1) Does the State Industrial Accident Law apply to employees under the legal age?

(2) Does the fact of a permit to work having been issued affect the question?

The preamble to the original law of 1914 (Chapter 800) after setting out the fact that the industrial enterprises of the State involve numerous injuries to workmen and that the rules of the common law distribute the burden of such injuries unequally, at great cost to the workmen and taxpayers, for litigation, and to the taxpayers for the support of the injured and their dependents, and further the inadequacy of the common law rules and system to deal with modern industrialism, uses the language:

"Now, therefore, the State of Maryland, exercising herein its police and sovereign power, declares that all phases of extra-hazardous employments be and they are hereby withdrawn from private controversy and sure and certain relief for workmen injured in extra-hazardous employment and their families and dependents are hereby provided for, regardless of questions of fault, and to the exclusion of every other remedy, except as provided in this act."

The reasoning of the preamble may well be used to throw light on the legislative intent. If the law stood alone it would necessarily be presumed that every case of extra-hazardous employment was covered by the law. But by its side stands another police and sanitary law, of the very highest importance, the Child Labor Law, codified in Article 100 of the Code, as modified by Chapters 222 and 701 of the Acts of 1916.

By this law it is made a criminal offense to employ minors of specified ages in certain employments. Section 4 prohibits the

employment of children under 14 in or about or in connection with any "mechanical establishment," "manufactory or workshop," and Section 7 provides that "no child under the age of 16 years shall be employed, permitted or suffered to work" "in proximity to any hazardous or unguarded belts, machinery or gearing; or on any machine or machinery operated by power other than foot or hand power."

Under Section 9 children between 14 and 16 are permitted to work at the employments named in Sections 4 and 5 upon obtaining a permit, but children under 14 are not allowed to obtain permits and there seems to be no provision for children under 16 obtaining permits to work at the employments prescribed in Section 7.

Tho boy injured was actually under 14 and so was not entitled to any permit at all, and evon if he had been over 14 hc was not entitled to a permit to work at a brick manufacturing plant, which would be obnoxious to Section 7.

The first question, therefore, is this—does the State Industrial Accident Law, by the broad language of its preamble and by the language in Section 14 make it applicable to cases where the employment is illegal under the Child Labor Law? Upon genoral principles it would seem to be clear that the only relations covered by the Act are thoso which are legal and authorized. The State can hardly be said to have provided for a large class of cases which it has said must not be permitted to exist. If it be true that equity regards that as done which ought to be done, is it not fair to hold that the law will not contemplate, as subjects for remedial legislation, those relations which it has said cannot come into existence without crime? A contrary construction would seriously weaken the Child Labor Law. It seems, therefore, much more likely that the Legislature when it used the broad language of the preamble and of Section 14, meant all phases of extra-hazardous employments permitted by law to be created. This construction, besides being in accord, as I think, with right reason, has been sanctioned by authority. In Hetzel vs. Wasson Piston Ring Co. (N. J. 98 Atl.) L. R. A. 1917D 75, quoted by the Commission, Judge Gummere, in a well-reasoned opiniion puts the matter very forcibly and conclusively, and I am constrained to follow his lead, only refraining from getting

at large from him because of the space it would take. From his statement the language of the act he was construing was as broad in its claim of jurisdiction as is ours. See also the Corpus Juris Article on Workmen's Compensation Acts, Section 40, and Stetz vs. F. Mayer & Co. (Wis.) 156 N. W. 971.

Another consideration brings me to the same conclusion. The law provides for a system of insurance, and of premiums based on the wages paid and the probability of loss. Now how could an insurance company, by any actuarial system, compute its probable losses, if it did not know what the conditions of employment would be? It is in the nature of things likely that the probability of accident will be increased in proportion to the immaturity and inexperience of the workmen, but if no limit of age is assigned for employees in hazardous work, no intelligent forecast can be made of the likelihood of accident. But given the limits of age of the Child Labor Law, statistics are easily available from which the insurer can properly protect himself. It cannot be thought that his policy is intended to cover contracts prohibited and made criminal by law.

It seems to me, therefore, that the whole scope of the law is modified or properly interpreted by other statutes existing at the time of its passage and that all must be read together. This was the view of the State Industrial Accident Commission and the judgment founded upon it is correct, unless the existence of the permit can change the status of matters. I do not think it can. This permit will undoubtedly play an important role in any criminal proceedings, or in any suit at the common law brought in this case. But the permit was unquestionably illegally issued and cannot make the employment legal, although it may well protect the employer against the consequences of employing a child under age. The law might have made the granting of the permit conclusive evidence of age, but it does not. It merely provides that no child under certain ages can work without a permit and that no permit shall be granted to children under certain ages. In Stryk vs. Minchowicz, in 167 N. W. 246, this question was decided. True the Wisconsin statute provided that the Workmen's Compensation Law should be applicable to minors "legally employed," but that is what I think our statute, by a proper interpretation, provides.

The rulings upon the prayers are intended to carry into effect these views. Exceptions are noted for the appellant to the rulings. Under Section 56, providing for appeals, the Court sitting as a jury can do nothing but pass upon such questions of fact as are, upon motion, submitted to the jury, which has not been done in this case. As a jury I find that the deceased was employed or permitted to work about a manufactory or workshop, and that he was under 14 years of age, and as a Court I find this to have been an illegal employment outside the scope of the Workmen's Compensation Law, and that the Commission has acted within its powers and has correctly construed the law and the facts, and the Court affirms the decision of the Commission. If either side wants the matter more formally put for an appeal, I will do so. Without knowing what the practice in such cases is, it would seem to me that issues should be submitted to the Court as a jury and answers to these issues of fact obtained.

IN THE BALTIMORE CITY COURT.
(Filed October, 1918.)

LEE MOORE

vs.

LAWRASON RIGGS ET AL., Constituting the Board of Police Commissioners of Baltimore City.

Kaufman & Kaufman, for plaintiff.

William Pinkney Whyte, Jr., Assistant Attorney General, for defendants.

REPLEVIN SUIT.

Opinion on Demurrer to Pleas.

DUFFY, J.—

In this proceeding it appears that the plaintiff was arrested in a criminal prosecution for larceny, and the goods in question were seized by the police. In due course he was tried and ac-

quitted, and sued out the writ in this case against the Police Board, and seized the goods which were the subject of the charge of larceny against him.

Replevin will lie against the Police Board for a detention of property which is not warranted by law. Soper vs. Michal, 123 Md. 545.

Section 755 of the Charter, relied on by the defendants, is a regulation of the department prescribing the duties of police officers, detectives and the secretary of the board. It is not intended to affect the rights of an individual whose goods are unlawfully detained by the board.

The plaintiff in this action can recover if he can show a right of possession in himself as against the defendant. The Transportation Company, which also makes a claim for the goods, cannot interfere with the right of the plaintiff to a judgment in this case, because it is not a party to this proceeding, and has no right to intervene to have its rights litigated. Wells on Replevin, Sec. 634.

Not being a party, the company is not bound by the judgment and can replevy the goods from the plaintiff, notwithstanding this proceeding, if it can prove its right to possession as against *him,* unless it is estopped on the principle laid down in McKinzie vs. B. & O., 28 Md. 174.

The defendant can plead property in a third person, and upon the issue thus joined the burden will be upon the plaintiff to show title or right of possession superior to that of such third person. Poe on Practice, Sec. 442; 90 Md. 160, Hopkins vs. Cowen.

Upon such plea, if he succeeds, defendant is entitled to return of the goods, because it destroys the plaintiff's title, and because the possession which he had before the issuance of the writ was wrongfully disturbed by the replevin. Lamotte vs. Wisner, 51 Md. 561; 1 Hill, 353, Ingraham vs. ————.

The second plea sets up title and possession in defendant and is good.

The third plea is bad. It is permissible but not usual to join principal and agent as defendants in replevin. 113 Mass. 403, White vs. Dolliver; Wells on Replevin, Sec. 144.

Demurrer to first and third pleas sustained, and to second plea overruled.

IN THE BALTIMORE CITY COURT.
(Filed January 4, 1919.)

Proceedings on Writ of Mandamus to Change Tonnage Rating of Automobile Trucks Made by Commissioner of Motor Vehicles.

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CHARLES H. KAUFMAN

vs.

E. AUSTIN BAUGHMAN, COMMISSIONER OF MOTOR VEHICLES FOR THE STATE OF MARYLAND.

Osborne I. Yellott, for the petitioner.

Philip B. Perlman, Assistant Attorney General, for the defendant.

GORTER, J. (orally):

It appears that the manufacturer has said to his purchaser that the truck would carry three tons or three and one-half tons. I do not see anything in the literature to say that the roads must necessarily be perfect. I think the impression that it would make upon a purchaser is that he could safely, after he had put a body on the chasis that weighed a ton, that he could safely carry in that body, without violating the warranty, three and one-half tons. Of course the roads might be so bad that you could not carry two tons, and it might be that the roads would be so good that you could carry four tons with safety. But the fair meaning, it seems to me, the meaning to the ordinary man, is that the truck will carry three and one-half tons under favorable conditions.

As the Commissioner of Motor Vehicles has given the rating that the manufacturer gives, and as the manufacturer says to the purchaser that he warrants the truck to carry three and one-half tons, it seems to me that the Commissioner would be justified in classifying this truck as one that exceeded the three-ton limit.

The question has been raised by reason of the way in which the manufacturer has classified the truck and it has caused a

very interesting argument. I believe the intent of the law was to leave a question of that character not to an inexperienced man in automobiles, but to one who is supposed to be skilled, like Commissioner Baughman. I believe it is not a question for the Court to determine, but is a question for the commissioner to determine.

Therefore, as it seems to be a question that he could reasonably determine in the way he has, and he has so determined it, it does not lie within the province of the Court to overrule his decision.

I will dismiss the petition.

IN THE SUPERIOR COURT OF BALTIMORE CITY.
(Filed April 30, 1919.)

MAYOR AND CITY COUNCIL OF BALTIMORE

vs.

M. BATES STEPHENS, STATE SUPERINTENDENT OF PUBLIC SCHOOLS.

Petition for Mandamus Against State Superintendent of Schools to Correct School Census—Powers and Duties of Superintendent—School Fund Distribution in Advance by Comptroller.

S. S. Field, City Solicitor, for the petitioner.

Ogle Marbury, Assistant Attorney General, for the defendant.

BOND, J.—

The petition prays that the writ of mandamus be issued to command the State Superintendent of Schools to modify or supplement the school census of 1918, so that the population between the ages of six and fourteen years in the areas annexed to the City in 1918 shall be credited to the City in the basis for apportioning two-thirds of the residuum of the State School Fund under Article 77, Sec. 138 of the Code.

It appears from the testimony taken, as well as from the exhibits filed with the pleadings, that the school census of 1918 was based upon an enumeration of colored children as of April 15th, and of white children as of May 15th. Effort was thus made to gather the figures before the end of the current school year. Reports of the results were, in some instances, not placed in the hands of the State Superintendent of Schools until after June 1st, and the tabulation of all figures was not completed until later. The figures were tabulated according to the geographical divisions as they existed before June 1st, regardless of the shift of territory and population from Baltimore and Anne Arundel Counties to Baltimore City on that date. Without a special inquiry, out of the ordinary course of proceeding under the statutes, it was inevitable that this should be so. The statutes (Article 77, Secs. 21B, 25M and 75) would ordinarily require merely that the teachers in the counties should report on the facts within their several domains, to their principals, and that the principals and superintendents in turn should gather the figures and forward them to the State Superintendent as the reports of the separate county organizations. Collection of figures to meet a shift of boundaries and populations to take effect later would seem to require special and additional directions for a particular census. The times of taking the existing census, that is, as of April 15th and May 15th, would be eminently proper in regular course. And for all that appears in the case the census was correctly taken as of those dates. It does not divide the children so that the figures can now be compiled from it to conform to the changes in boundaries. The new boundary lines run right through populations enumerated in the present county school census, and leave on each side children counted in the census of schools on the other side; and facts and figures which would be necessary to a sorting according to the new lines have not been collected.

Counsel for the City argue that the present census must be regarded as a census "taken," within the meaning of Section 21B, after June 1st, and after the shift of population, because the reports and tabulations came after that date. On this argument the application for the writ of mandamus is largely based. Section 21B gives the State Superintendent express power to

"cause the whole or any part of the school census of the City of Baltimore or of any county to be retaken at any time, if, in his judgment, the whole or any part of such census has not been properly or correctly taken." And it is contended that this census was not properly or correctly taken, inasmuch as when tabulated it erroneously reported the school population of the counties. And as a consequence, it is urged, there is need of retaking the census under the power given in the clause quoted. The Court is asked to command the exercise of the power under that clause. But, in my opinion, the "taking" of the census referred to in that clause, the taking which the State Superintendent is expressly empowered to order corrected by a retaking, is the original enumeration by those subordinate to the county superintendents. The statutes expressly leave to these subordinates the work of taking, which is to be directed. The superintendents merely transmit orders, and, presumably, reports. The scope of the census is necessarily limited to the scope of the original enumeration, the tabulations and reports which may follow are mere presentation of results. And this original taking of the census was, as has been stated, accomplished before June 1st, 1918. It was all correctly done according to such direction as was issued from the State Superintendent. The objection is rather to a census taken in the regular way in the face of a change soon to take place, which would render that census unfitted for the uses to which it was to be put. It was an objection that the change was not anticipated, and that the necessary special inquiry, or additional census, was not ordered to adapt the figures to the coming new conditions. And this is, in my opinion, an objection to the direction of the work by the State Superintendent himself, rather than to the carrying out of directions; and any correction in this respect, as has been said, would not, in my opinion, be one contemplated in the last clause of Section 21B.

The conclusion that such a correction is not contemplated in the clause in question is reinforced by the unreasonableness of a contrary construction by which the correction of all defects in a census, even such as might consist of departure from express statutory directions, would be referred to the State Superintendent's judgment on the existence of the defect. If, for instance,

a census should present an enumeration in one part of the State of only the children between the ages of six and twelve years, whereas Section 21B itself requires that it enumerate all in the State between six and eighteen years, can it reasonably be held that the power to make the correction needed is to be found under the clause which empowers the State Superintendent to act when in his judgment the need exists? The answer can only be, as I see it, that the clause under discussion is limited to the correction of defects, not in essentials of the scope of the census, but in the original enumeration within the correct limits. As has been said, I think that in this case we are not concerned with the clause in question.

To meet the objection of the City, then, it would be necessary for the census takers to return to the work and ascertain the residences of children who attend school near the new boundary lines, on each side. Is there to be found in the law any requirement that the census of 1918 be so extended? And, if so, does the law anywhere impose upon the State Superintendent a clear duty to bring about that extension; a clear duty the performance of which a court can enforce? The statutes which order the taking of the census (Secs. 21B, 25M and 75) give no specific directions for the scope and classifications of it. Section 21B, which contains the direction to the State Superintendent, reads:

> "The State Superintendent of Schools, subject to the rules and regulations of the State Board of Education, shall direct the taking of a biennial school census of all children in the State between the ages of 6 and 18 years inclusive, to be taken in the year 1918, and every two years thereafter, etc."

And no more explicit directions are contained in Sections 25M and 75. The letter of these sections would be satisfied by an enumeration in a lump figure of all the children in the State between the ages of 6 and 18 years. As the census is to be taken by counties, through the separate county superintendents, it is clearly contemplated, perhaps, that it shall be tabulated to show the population distributed among the counties. But the letter of these statutes does not require collection of figures for any further classification.

The scope and contents of the census cannot, however, be determined without relation to the uses to which it is to be put. A census is not an independent institution, which may be sufficient unto itself. It is a step preparatory to the accomplishment of purposes of the State government designated in various statutes, a means to these ends. It must fill its place in the whole scheme. And the uses designated for the census in any legislative enactment whatever, must be taken to prescribe *pro tanto* the scope and contents of the census. The function of the census is to perform the work authoritatively demanded of it, and in so far as it fails to meet the demands made upon it by the Legislature it is a defective census. For instance, this statute for the distribution of the residuum of the school fund refers to the census for an enumeration of the populations between 6 and 14 years of age in the City and in the counties; that reference must be taken, and is taken, to impose a duty of procuring a census which will give the populations between those ages, although Sections 21B, 25M and 75 do not of themselves require it. Applying this rule to the statutory provision for the basis of apportionment of the two-thirds of the residuum of the fund for the next year, it results that the census is required to furnish whatever information is demanded by the statute to fix that basis as intended. And exactly what, then, is the information demanded?

It is the obvious purpose of the statute to distribute this part of the fund as nearly as practicable according to the distribution of the burden of public education in the State. The census figures of populations are referred to as the best available index to the proportionate distribution of that burden. To serve as such an index the census must show populations within the territorial divisions with which the Comptroller actually has to deal. As the Comptroller had to make his apportionment about October 1st, 1918, then to furnish that service in 1918 the census had to show the populations distributed according to the geographical divisions which went into effect in June under the annexation act (Acts 1918, Chap. 82), and with which the Comptroller would actually have to deal. Unless the census gave these figures the Comptroller could not have the figures which the statute assumed he would have. He could not have

the figures on which it was intended he should proceed. And if the census had to be made in the Spring, before June, then to fulfill its function, it should have anticipated the change of June 1st, and made the inquiry which is demanded in the present petition.

But is there imposed upon the State Superintendent a clear duty to procure the additional or supplemental census which upon this reasoning appears to be required? And can the Court enforce the performance of the duty if it exists? Section 21B provides merely that the State Superintendent of Schools * * * shall direct the taking of a biennial school census." In my opinion that does not mean that his whole duty may be performed by issuing an order to the City and county superintendents to take a census, without more. There would be no reason for interposing him merely to transmit the legislative order in such general terms as are used in Section 21B. The function of the State Superintendent must be taken rather as that of a supervising officer, and the official medium for procuring a census such as the law requires. It was clearly enough, I think, his duty to procure the figures demanded for the apportionment of the residuum of the school fund. And I think it is his duty now to supplement and complete the census by ordering an inquiry which will enable him to distribute the school population according to the new boundary lines.

Should this duty be enforced by the writ of mandamus?

One objection suggested is that the performance of any duty which may rest upon the State Superintendent under Section 21B is discretionary, and so not subject to the control of the Court. This has been answered, in part, earlier in this opinion. As has been said, the last clause of that section, which relates to the retaking of the census to correct errors or improprieties in the first taking, refers, in my opinion, to errors or improprieties in the execution of the work by the subordinate principals and teachers. The deficiency which I find in the census taken I regard as the result of an error in the direction of the census by the State Superintendent himself. This is an omission of an essential, analogous, for instance, to the omission of a county or other large section altogether from enumeration. And outside

of the clause in question I can find no reason for denying the writ.

Another objection to its issue is that the correction demanded would work an injustice to county taxpayers. Much of the argument in the case was based upon this objection; and if well founded it would probably make the Court hesitate to interfere. It is assumed in the objection that the fund under discussion is to be paid out to meet the burden of education in the annexed areas from and after the first of October, 1918. The Annexation Act defers the transfer of schools and education in those areas, however, until January 1st, 1919. It would be a partial defeat of the legislative purpose, and injustice to the county taxpayers if in consequence of a transfer in the figures of population the City should receive the portion of the fund due for the education of so much population during three months while the burden of education is borne by the counties. But I agree in the conclusion of Judge Thomas and Judge Moss in their opinion, filed in the suit by the City for an injunction against the State Comptroller, that the fund is to be paid out to aid in meeting the burden and cost of education only after January 1st, 1919, and not for the months of October, November and December, 1918. The fund is one to be paid out for the calendar year, not for the school year. I have concluded that there is no difficulty from this source.

The writ of mandamus will issue commanding the respondent to supplement the school census of 1918 by instituting an inquiry, and causing to be collected figures showing the population of children between the ages of 6 and 14 years, inclusively, resident within the areas annexed to Baltimore City, under the Act of 1918, Chapter 82. It will be impossible now, perhaps, to present the figures as they would have been shown by an inquiry before September 30, 1918. But it is after all the proportionate distribution of population on which apportionment of the fund is to be based, and the proportion may not have changed materially in the last year. It will be sufficient if the inquiry now to be made bring in the best practicable supplementary information looking to compliance with the purposes of the statute.

IN THE SUPERIOR COURT OF BALTIMORE CITY.
(Filed July 28th, 1919.)

STATE OF MARYLAND

vs.

N. WINSLOW WILLIAMS.

Salary and Fees of the Secretary of State.

Suit for Return of Fees Received.

Philip B. Perlman, Assistant Attorney General, for plaintiff.

Edgar Allan Poe, for defendant.

BOND, J.—

The Constitution specifies a salary of $2,000.00 for the Secretary of State; and the General Assembly in the Acts of 1906, Chapter 449, Sections 131 and 139A, provided that from each fee paid by owners and operators of motor vehicles, one dollar should be retained by the Secretary of State "for his service in issuing the license, etc."

The plaintiff contends that the allowance of these amounts is an unconstitutional increase of compensation to this officer and on this point counsel have argued and submitted the broad question whether the General Assembly may add to the compensation of any one of the officers the amount of whose salary is specified in the Constitution without any reference to legislative increase or diminution.

Standing alone, a statement that the salary shall be $2,000.00 clearly amounts to a statement that it shall not be $3,000.00 or any indefinite amount beyond $2,000.00. That would be the ordinary meaning and effect of the words; and we must, I think, take that as their meaning here unless the evidence available shows a different conception of them on the part of the framers of the Constitution. It seems to me that the source of all the difficulty in holding to this construction is the provision that the salaries specified for the judges shall not be diminished during

their continuance in office (Secs. 24 and 31 of Art. 4 of the Constitution). There we have other specified salaries followed by limitations upon legislative power to modify, which limitations superficially at least, assume that power to exist in the absence of restriction. They are unquestionably, in form, restrictions upon existing power rather than original grants of power; and it is perfectly logical to infer from them that to the framers of the Constitution the fixing of the amount of a salary did not mean a prohibition of subsequent change by the Legislature. The constitutional prohibition in Section 35 of Article 3 on extra compensation to public officers and others and the increase or diminution of the salaries of public officers, and the denial in Section 17 of Article 3 of elegibility of Senators and Delegates to offices the salary or profits of which "shall have been increased" during their terms, seem to me to present comparatively little difficulty. Were it not for the doubt raised by the provision concerning salaries of judges I should have no hesitation in construing these latter prohibitions to refer only to salaries which the Constitution left the Legislature to fix in the first instance.

Such limitations upon legislative modification of compensation were of course, not novelties in the Maryland Constitutions of 1851, 1864 and 1867. In the Constitution of the United States it was provided that the President should receive a compensation "which shall neither be increased or diminished during the period for which he shall have been elected" (Art. 2, Sec. 1). The same constitution provided that the compensation of judges "shall not be diminished during their continuance in office" (Art. 3, Sec. 1). It was there provided too (Art. 1, Sec. 6), that no senator or representative should during his term be appointed to any civil office the emoluments of which had been increased during that term, and the framers of the Maryland Constitution of 1851 had all of these provisions before them in constitutions previously adopted in other States. In the debates reference was frequently made to provisions in these other constitutions. In twenty-one of the thirty-one States then in existence there were constitutional restrictions upon change of the compensation of Governors, in the words of the federal provision concerning compensation of the President.

Several other State constitutions had provisions that the compensation of judges should not be diminished during their continuance in office; and the same provision had been adopted in Maryland by a constitutional amendment ratified in 1805. (See collection of "American Charters, Constitutions, etc.," edited by Thorpe.) Compensation for the judges had been added to in Maryland by several legislative enactments before 1851 (*e. g.*, Act 1828, Chap. 127). There had also been several increases of the salaries of Federal Judges by Acts of Congress (*e. g.*, Act approved May 29, 1830). In all of these instances the legislative bodies had the fixing of the compensation in the first instance, and when they made modifications they modified only their own previous enactments. It was toward the middle of the century that the practice of specifying the amounts of salaries in constitutions began.

Sections 4 and 5 of Article 4 of the Maryland Constitution of 1851 specified the amounts of salaries of judges and added that these should not be *increased or diminished* during the continuance of the judges in office. The Committee on the Judiciary Department in the convention of 1851 had recommended that the limiting provision should be only that the salaries should not be *diminished*. In either form this combination of specified amount with a limitation upon legislative action was novel.

The Constitution of 1864 provided fixed salaries for all judges, but only with reference to the judges of the Circuit Courts in the counties was there added a limitation on legislative action. There was a prohibition against the increase or diminution of the salaries of those judges during their continuance in office (Art. 4, Secs. 21, 28 and 32).

The Committee on the Judiciary Department in the Constitutional Convention of 1867 reported (page 333 of the proceedings) a draft in which the salaries of all judges were fixed in amount with a provision that they should not be diminished during their continuance in office. During the convention amendments were offered, some to fix the amount of salary without any clause limiting change, some to fix the amount with a clause prohibiting increase or diminution during a term of office, and some to leave the fixing of amount to the Legislature.

(See, for instance, Mr. Archers' Amendment, page 444 of the proceedings; Mr. Mitchell's amendment, page 503; and Mr. Hayden's amendment of August 8th, 1867, to Section 31.) These amendments were ultimately rejected and the clauses left as we now have them, in the words of the original Committee report.

As has been pointed out there was in the Conventions discussion of the meaning and effect of the several clauses which we have to consider. In the Convention of 1851 in the report of the debate on the provision for the compensation of the Governor, which had been fixed at $3,600.00 without more, there is this remark noted (Vol. 1, page 490).

> "Mr. Grason said, he had voted for the $4,000.00, and he had also voted for $3,600.00. The Legislature could not raise or diminish the salary after the provision shall have gone into operation."

In debate on compensation of the Attorney General, Mr. Crisfield said (Vol. 1, page 520), "that he desired that the Attorney General should be an officer who should receive a salary. If the Legislature should think, upon the performance of any unusual service, that he should receive additional compensation, they could give it to him."

There was no further discussion of the possible legislative change of compensation in the debates on salaries of the executive officers: Governor, Secretary of State, Attorney General, Comptroller and Treasurer.

In the debate on compensation of judges the discussion turned largely on the need of superseding the method of paying judges in part by fees and perquisites, a method followed under laws enacted since 1828. In Baltimore City especially these fees and perquisites had increased greatly in total amounts; and at the beginning of the convention the clerk of the Baltimore County Court was called upon to furnish a report of the resulting compensation to the judges. The report printed in Volume 2, page 556 of the report of the debates, showed that the judges of that Court were receiving up to $7,000.00 per year above the salary fixed by previous Act of Assembly. Mr. Crisfield of Somerset County led the debate on this subject. All speakers appear to

have agreed with him in the main and the following quotation may be taken as a statement of their views and purposes.

Mr. Crisfield (Vol. 2, page 556):

"Now a system like this was the worst that could be conceived, because the judge's salary was dependent on the discharge of his judicial functions. The most mischievous system on the face of the earth for the payment of judicial labor was that by which the pay of the judge depended on granting the requests of suitors. This system had been growing up by piecemeal ever since 1828. And, why had it been growing up? Because the judges had not been allowed, directly from the Treasury, a reasonable compensation for their services. Hence this reprehensible system of legislation. He did not intend to cast odium upon those judges. He had never heard their conduct complained of. But the system was wrong and ought to be discountenanced; and he now went for liberal salaries to prevent all temptation to seeking an increase of compensation by indirect means. He was opposed to all perquisites. He wanted the judges to receive a compensation which was fixed by law—a compensation sufficient for their services, and which should not be diminished while the judge was in office. And he would go further and say it should not be increased while he held his commission. The judge should stand perfectly independent, and he should know that when he went into office his salary was fixed, and not to be increased or diminished whilst he was there."

After the amount of the salary had been fixed, then on motion of Mr. Brown, the section was amended by inserting the words "increased or" before the word "diminished." And on motion of Mr. Bowie there was added the words: "And no fees or perquisites of any kind shall be allowed by law to any of the judges." Later Mr. Spencer (Vol. 2, page 558) moved to reconsider Mr. Brown's amendment so that the Legislature might in future increase the salaries. He argued that it would be unwise to leave it necessary to call another constitutional convention to increase them. The motion was lost by a vote of 63 to 5.

In the convention of 1864, Mr. Miller (afterwards Judge Miller) offered an amendment to strike the words "increased or" from the clause which provided:

> "Nor shall the salary or compensation of any public officer be increased or diminished during his term of office."

That is part of Art. 3, Sec. 35, of the Constitution of 1867.

Mr. Miller in explanation referred particularly to the depreciation in the value of currency, which in 1864 was pronounced, and the effect upon judges of an unvariable salary. The following portion of the debate upon the amendment has been referred to:

Mr. Miller continuing his explanation said (Vol. 2, page 803): "I wish therefore to leave it in the power of the Legislature to make that salary correspond to what it really ought to be for our officers; not to give the Legislature the power to diminish, but to give them power to increase it from time to time to meet the exigencies which may arise."

Mr. Sands preferred that the Legislature should have the power to change salaries every year or two.

Mr. Miller said he preferred that his motion should go over to await the fixing of salaries, as until that information was at hand the convention could not vote intelligently.

"I should prefer, however, that the amendment I have offered should go over until it is ascertained what the salaries of our officers are to be; what is to be the basis upon which they are to be fixed by the various committee who have charge of them."

(Mr. Stirling): "I cannot see what good will be accomplished by postponing this subject. No matter what may be the salaries fixed by the committees; if they are put into the Constitution the Legislature cannot change them."

(Mr. Miller): "If we give the Legislature the power, they can change them."

(Mr. Stirling): "Of course, if we give them the power they can. We might do as the old Constitution did, fix no salaries, leaving the Legislature to fix them all. This section only applies to those salaries which the Legislature has the power to regulate. Other salaries, those fixed by the Constitution, cannot be affected by the Legislature."

(Mr. Miller): "Does not this clause apply to judicial officers as well as to others? Certainly it does. It prohibits the Legislature from making them any greater. I think the provision of the Constitution of the United States is a proper one. It gives to Congress the power to increase the salaries of officers whose minimum salary is fixed in the Constitution. If this amendment is adopted, I think the Legislature ought to have the power to increase."

(Mr. Stirling): "But if the Constitution says that a judge shall receive $2,500.00 a year, for instance, then the salary will remain fixed; the Legislature cannot increase it."

(Mr. Miller): "Then this provision is superflous."

(Mr. Schley—Vol. 2, p. 804): "It was believed by the committee that under a general law the salaries of classes of public officers can be increased or diminished; but not of any public officer during his term of office."

(Mr. Miller): "The provision of the Constitution of the United States bears out the construction I should place upon this provision of our Constitution should any amendment be adopted. The clause of the Constitution of the United States, in reference to the salary to the President, provides that he shall receive a stated sum for his services, which shall not be increased or diminished during the term for which he shall be elected. That fixes his salary at so much. But when you come to the portion of the Constitution relating to the judiciary, you find the provision to be that the judges shall receive for their services a compensation which shall not be diminished during their continuance in office. But Congress has increased the salaries of the judges of the Supreme Court of the United States and of district judges under that clause, there being nothing in it prohibiting Congress from increasing their salaries or making such additional compensation as from time to time they may choose to give to those high officers. My amendment would allow the Legislature, from time to time, to meet the exigencies of the currency, to increase the salaries of those officers in order to keep them up to what ought to be the standard of such salaries."

Debate then proceeded on the method of accomplishing this result.

Mr. Stirling then offered an amendment to make the clause read:

"Nor shall the salary or compensation of any public officer be increased or diminished during his term of office, except in cases specially authorized by this Constitution." And he added:

"That will embrace every case. It looks like an invidious distinction in favor of judges, to mention them in this particular manner, and it will be an unpopular thing. It will be saying that the Legislature can give judges what they please, but nobody else. Make it a general provision, and not one especially in favor of judges."

(Mr. Miller): "I will accept the suggestion of my friend from Baltimore City (Mr. Stirling) if this section does not bind us up when we come to the article on the judiciary. I will therefore modify my amendment so as to add to this section, the following words:

"Except in cases specially provided for in this Constitution."

On vote then taken the amendment was lost, and the section was left in its present final form.

Mr. Cushing (Vol. 3, p. 1619) said: "If gentlemen think that things are going to settle down to their old condition within the time of the judges under the present constitution, they are very much mistaken. You are making a provision in your constitution which will last only some twenty years at the furtherest; probably the Legislature, with power to submit amendments to the people at any time, may change it sooner. And the salary of $3,500 a year would not last perhaps for five years."

(Mr. Stirling—Vol. 3, p. 1622): "This provision says the judge shall not have any more."

An examination of newspaper reports of debates in the convention of 1867 has not brought to light any discussion of power in the Legislature to charge salaries.

This statement sets forth, I think, the sum of the material upon which a construction has to be made.

The debates, I think, do not alone furnish us with the explanation and construction we need. The expressions of opinion by a few members in the course of discussion can hardly be taken as giving the final opinions even of those members; and

certainly by no means reveal the opinions of the majority of the convention. And the expressions we have are conflicting on most points.

The actions taken by the conventions seem to me to give us some guidance, however.

In the Constitution of 1851 we find the original of the combination of salaries specified as to amount for the various executive officers, with the general clause in another place prohibiting increase or diminution of officers' compensation during their terms; and the salaries of judges also specified in amount, but with the same prohibition against increase or diminution attached. When, then the members of the Constitution of 1851 drafted the clauses in which they fixed the salaries of the executive officers, they failed to add directly to them the restriction upon increase and diminution which in the Constitution of the United States and in the Constitutions of two-thirds of the States had long been familiar incidents of the provisions for compensation of those officers. We must take this action, I think, as a deliberate rejection of the restriction as to such salaries, unless we can assume that the general restriction adopted as to the salaries of "public officers" was intended to affect these salaries the amounts of which the Constitution had fixed as stated. But it seems hardly likely, if this were intended, that the same restriction would be specially repeated as to one group of officers, the judges, with fixed salaries. There would have been no reason for doing so. And I think we must infer from this that the general restriction was not intended so to apply. If this is correct—if the general restriction did not affect the fixed salaries of all other officers,—then it follows either that the Legislature was left with unlimited power over the amount of compensation of those officers or that it was left with none at all. Unlimited power in the Legislature over officers' salaries was contrary to the disposition of the time; and seems inconsistent with the effort of the Convention in fixing the amount in the Constitution itself. These considerations seem to compel the conclusion that the salaries fixed in the Constitution of 1851 were intended to be fixed beyond power in the Legislature to modify. It may be objected that this argument subjects the Constitution to too severe a test of logical consistency; and the

reported discussions in the Convention lend strength to that objection. But if we are not permitted to refer the Constitution to such a test, then we are left without a test to explain apparent inconsistencies, and, as I see it, must fall back on the construction of the clause alone which fixes the salary at the sum named, and hold that it must be no more and no less but so. Similar reasoning seems to lead to the same conclusion with respect to the two later constitutions. The result seems, indeed, somewhat clearer here.

In the Constitution of 1864 the prohibition of increase or diminution was repeated specially only as to the compensation of judges in the counties (Art. 4, Secs. 21, 28 and 32). The salaries of the judges of the Court of Appeals and of the judges in the city were fixed in amount, without more. If it were intended that the general prohibition should apply to all fixed salaries it would hardly have been repeated specially as to those of the county judges. And the inference that it could not have been intended that the Legislature should have unlimited power over fixed salaries is strengthened by the distinction between the county judges and all others. For it seems unreasonable to suppose that the Legislature was left with carefully limited power over the amount of salaries of county judges and entirely unlimited power over the salaries fixed in others. The conclusion must be that as to these fixed salaries, and as to all others so fixed, the Legislature was left with no power.

In the present Constitution of 1867, the Legislature is, to repeat, prohibited only from diminishing these salaries of judges. And now we come back to that which, as has been said seems to me to be the main cause of difficulty; the possibility of inferring from this limited restriction that the framers of the Constitution conceived of all their fixed salaries as subject to legislative modification except in so far as expressly restrained in the Constitution. The general prohibiting clause (Art. 3, Sec. 35) could not now apply to the provisions concerning salaries of judges, for it conflicts with them. Yet we are still not free to construe that clause of general prohibition as recognizing a legislative power to modify the fixed salaries of executive officers. Taken as it is from the earlier constitutions it seems unreasonable to suppose that the same clause was continued

without verbal change and given a new and enlarged significance. It almost certainly means the same as before; and if the earlier reasoning is correct it did not affect salaries fixed in the Constitution but left them beyond the power of the Legislature.

My conclusion upon this argument is, therefore, that the prohibition against the diminution of the salaries of judges in the last Constitution does not support a construction that the Legislature has power to modify fixed salaries generally, except in so far as it is restrained in the Constitution expressly. This is arguing from such indications as we have outside the clauses themselves which fix the salaries without more.

It seems to me merely to confirm the conclusion from the ordinary meaning of such clauses, as I have said. And so in my opinion, the Legislature did not have power to add to the compensation fixed by the Constitution for the office of Secretary of State. If construed as attempting such an addition then Sections 131 and 139A of Chapter 449 of the Acts of 1906 are invalid.

But there is still another question to be answered in order to determine the validity of a statute which attempts to add to the compensation of such an officer. The fixing of a salary in the constitution does not prevent the allowance of additional compensation for services performed outside the duties of the office. If, for instance, a distinct new office is conferred upon the same officer, he may be given the compensation proper to each. And, by the same reasoning, when the Legislature imposes distinct duties without establishing a new office, additional compensation may be given for the additional services, notwithstanding a prohibition in any such clause as has been discussed against an increase in compensation for any one office. An illustration is in the case of United States vs. Brindle, 110 U. S. 688, in which the holder of the office of receiver of public moneys at a Government land office was appointed to assist a special commissioner to dispose of lands of certain Indian tribes ceded to the Government in trust for that purpose. The Supreme Court approved payment of additional compensation upon this reasoning.

"When, therefore, Brindle was appointed special receiver and superintendent, to assist the special commissioner in disposing

of the trust lands, he was employed to render a service in no way connected with the office he held.

"He was not appointed to any office known to the law. No new duty was imposed on him as receiver of the land office. So far as anything appears in the record, the appointment was not made because Brindle was receiver of the land office. The duties to be performed were of a different character and at a different place from those of the land office, and while the exact amount of compensation for this service was not fixed, it was clearly to be inferred that such compensation as the law implies where labor is performed by one at the request of another, that is to say, a reasonable compensation, would be paid."

In Love vs. Baehr, 47 Cal. 364, the Court approved an extra payment of $1,500.00 to the Attorney General of the State who had been designated to act with a board of examiners to approve or reject claims against the State, examine books of officers, count money, and invest funds. This was held to be extra work which he was at liberty to decline consistently with the full performance of the duties of his office. Referring to the Superintendent of Schools and the State Geologist the court said: "Can it be claimed with any show of reason that the Legislature could compel either of them to become *ex officio* warden of the State prison or superintendent of the State lunatic asylum."

So a register of deeds has been held entitled to receive additional compensation for making reports of mortgages to assessing officers and registers in other counties. Roulo vs. Auditors, 74 Mich. 129.

Magistrates have been allowed additional compensation for attendance at committee meetings. Thomas vs. O'Brien, 129 S. W. 103.

The Mayor of a city, who was a lawyer by profession, was held entitled to receive extra compensation for defending a suit brought against the city. Mayor vs. Muzzy, 33 Mich. 61.

A judge properly received additional compensation for the work of issuing liquor licenses. Miama vs. Collins, 47 Kans. 417.

On the other hand neither a judge nor a clerk of court were allowed additional pay for added work in connection with the

selection of juries. This work was considered appropriate to their offices. Moore vs. Nation, 80 Kans. 672; United States vs. King, 147 U. S. 676.

The Maryland Constitution, Article 2, Section 23, provides that:

"The Secretary of State shall carefully keep and preserve a record of all official acts and proceedings, which may at all times be inspected by a committee of either branch of the Legislature; and he shall perform such other duties as may be prescribed by law, or as may properly belong to his office, together with all clerical duty belonging to the Executive Department."

This gives a broad charter to the Legislature to impose new duties on this official. But it is not an unlimited charter. The measuring out of compensation at the fixed sum of $2,000.00 shows that a limited field of duties was in the minds of the framers of the Constitution. We may be sure we shall defeat the purpose of these framers in one way or the other if we add duties without any limit, and yet maintain the compensation throughout at this figure of $2,000.00. We may say, with some of the decisions cited, that the Legislature has not the power to compel the performance of entirely distinct duties; but that seems to me to be an unserviceable test of the power to give extra compensation, with which we are concerned. Resistance by an incumbent to the mere addition of duties to the office by the Legislature is so nearly unthinkable that a test which assumes it is likely to lead us astray. We need only ask whether the new duties are so distinct that the Legislature may reasonably treat them as outside those contemplated in the creation of the office and the fixing of compensation for it, and so give outside or additional compensation. As far as they can reasonably do so the courts must defer to the judgment of the Legislature on the character of the new duties and their relevancy to the office as originally conceived. The Legislature is likely to be much better informed on these things. And following these principals my conclusion is that the Legislature might well have concluded that the work of registration and license of motor vehicles under the Act of 1906 was distinct from that of the original office. It is a work of a kind unthought of in 1867, when the Constitution was adopted; and it is a work of magni-

tude. We know now, from experience, that it might well have required in time a large organization and establishment under the supervision of the Secretary of State. I have no hesitation in accepting the view that this work is outside the ordinary functions of this officer, and that the extra compensation authorized by the Legislature is valid. I have refused the plaintiff's first prayer, accordingly.

I do not see sufficient legislative authority for the defendant's retention of the other amounts now claimed by the plaintiff. The Act of 1898, Chapter 270, Section 109A to 109E, and the Act of 1908, Chapter 240, Section 68, expressly provided that the fees paid by foreign corporations should be paid in by the Secretary of State to the Treasury.

That requirement amounts to an express denial to his right to retain any part for his compensation. McMullen vs. Shepherd, 133 Md. 157. And I cannot find any suggestion in the legislative enactments that the amounts to be paid to the Secretary of State for publishing the Manual and the election laws, and for printing sample ballots, should include extra compensation for the Secretary of State himself. There is no claim made by the Secretary on the basis of *quantum meruit* such as was approved in the case of United States vs. Brindle, 110 U. S. 688.

The plaintiff's second, third, fourth and fifth prayers are accordingly granted. The conclusions already set out explain the refusal of the defendant's first, and third prayers, and the granting of the second. The proposition of law set out in the defendant's third prayer is one with which I might possibly agree, but it is not up for decision as to all the duties imposed upon the Secretary of State inasmuch as the Legislature did not, as I see it, attempt to give compensation for the performance of all.

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